Civil Action No. 994

In the District Court of the United States for the Eastern District of Pennsylvania

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, ET AL., DEFENDANTS

STATEMENT AS TO JURISDICTION

(FILED MARCH 4, 1946)

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Supreme Court of the United States, as amended, the United States of America submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment of the District Court entered in this cause on January 4, 1946. A petition for appeal was filed on March 4, 1946, and is presented to the District Court herewith, to-wit, on March 4, 1946.

JURISDICTION

The jurisdiction of the Supreme Court to review by direct appeal the judgment entered in this cause is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 15 U. S. C. 29), and Sec-

tion 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C. 345).

The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case:

> *United States* v. *Crescent Amusement Co.*, 323 U. S. 173; *Interstate Circuit Inc.* v. *United States*, 306 U. S. 208; *United States* v. *American Tobacco Co.*, 221 U. S. 106.

STATUTE INVOLVED

The pertinent provisions of Sections 1, 2 and 4 of the Act of July 2, 1890, 26 Stat. 209, as amended, 15 U. S. C. 1, 2 and 4, commonly known as the Sherman Act, are as follows:

> SEC. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: * * *. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, * * *.
>
> SEC. 2. Every person who shall monopolize or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

> SEC. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. * * *.

THE ISSUES AND THE RULING BELOW

The Government filed its complaint in July 1940 against Pullman Company (referred to herein as Pullman), which operates and services sleeping cars; Pullman-Standard Car Manufacturing Company (referred to herein as Pullman-Standard), which manufactures sleeping cars and other railroad equipment; Pullman, Inc., a holding company owning the stock of the two former companies; and certain officers of the corporate defendants. The complaint, which charged the defendants with violating Sections 1 and 2 of the Sherman Act, alleged that Pullman had secured a monopoly of operating and servicing sleeping cars, by purchasing competitors and by making contracts with all the railroads giving it the exclusive right to operate and service sleeping cars. It was alleged that Pullman would service only cars owned by it and that it purchased cars only from its affiliate, Pullman-Standard, and that the defendants had conspired to monopolize the manufacture of sleeping cars. Among the alleged

effects of the combination were that the railroads were forced to use obsolete equipment, were not permitted to put into service superior equipment, and were required to guarantee Pullman a minimum return and to pay for all improvements of cars owned by Pullman. The relief sought included divorcement of the operation and the manufacture of sleeping cars, abrogation of the exclusive contracts for furnishing and servicing sleeping cars, and the requirement that Pullman operate and service sleeping cars owned by railroads.

In April 1943 the court, after trial, rendered an opinion (50 F. Supp. 123) sustaining the principal allegations of the complaint. As to relief, the court held (pages 136–137) that injunctive provisions against exclusive contracts and exclusive dealings would not suffice. It stated that the court's decree should provide for the following: (1) Separation of the business of Pullman from that of Pullman-Standard; (2) establishing the right of a railroad to purchase used sleeping cars from Pullman; (3) requiring Pullman to operate and service cars made by any manufacturer; (4) the right of any railroad to operate its own sleeping car business regardless of existing contracts with Pullman; (5) requiring Pullman to furnish through sleeping car service to any railroad or group of railroads; (6) eliminating all exclusive-dealing contract provisions, present or future, between Pullman and any railroad.

The court, after hearing argument on decrees proposed by the parties, filed an opinion in January 1944 (53 F. Supp. 908) which rejected the Government's contention that Pullman, Inc., be required to dispose of all interest in Pullman-Standard rather than be given the choice of which of its two businesses it should dispose of. The opinion does not mention a further contention of the Government that the court, if it permitted sale of Pullman, prohibit sale to the railroads. The court did not enter an order until May 8, 1944, when a "final judgment", which was largely interlocutory, was entered. This judgment required Pullman, Inc., to elect within 90 days of the effective date of the judgment* whether it would sell its sleeping car or its manufacturing business, and to submit at the same time a plan to effectuate such separation. Pullman, Inc., was required to carry out such plan within a year after approval thereof by the court. The court reserved judgment to determine to what extent it would require the purchaser to be bound by the court's judgment.

Other pertinent provisions of the judgment are: After the Court's approval of a plan of separation the railroads may purchase used cars from Pullman on such terms as the court shall order. Pullman shall, on the request of any railroad,

* The effective date is 60 days after entry of judgment or, if an appeal is taken, the date of filing the Supreme Court's mandate in the district court.

service and operate any cars owned by the railroad; offer partial service to any railroad; furnish cars from the pool of cars operated by Pullman, to the extent that they are available, to meet peak and seasonal demands; furnish and service cars required for joint through-line operation.

In September 1944 Pullman, Inc., submitted a plan for the purchase of the assets of Pullman by a new corporation to be formed by the railroads. On March 22, 1945, the court entered an order authorizing Pullman Company, Inc., to treat with "the railroads" or any other persons for sale of its sleeping-car business or its Pullman stock, any such sale to be subject to the approval of the court. Pullman, Inc., was given one year from the date of the order to make a contract of sale.

In May 1945 Pullman, Inc., offered to sell its Pullman stock to the railroads for about $75,000,000. Offers to purchase the Pullman stock were made by Otis & Co. in August, by Glore, Forgan & Co. in September, and by Standard Steel Spring Company in November. Late in October a group of railroads had offered to purchase the Pullman stock for some $17,000,000 less than the offer made to them. A full hearing was held on each of the four offers on November 5 and 6, 1945. Testimony and exhibits were presented. Immediately after these hearings the railroad group accepted in substance the offer made to it by Pullman, Inc., in May. The rail-

roads regarded this as creating a contract of sale, executory in the sense that it was subject to the court's approval. Each of the four prospective purchasers was permitted to intervene in the cause.

On December 18, 1945, the court, after having heard argument on the various offers, rendered an opinion approving, upon certain conditions, the contract of sale to the railroad group. The court concluded that in view of the requirements of its judgment of May 8, 1944, and the conditions which it was presently imposing, there was no danger of continuation of any unlawful monopolization by Pullman-Standard of the business of manufacturing sleeping cars or that there would be any unlawful monopolization by the purchasing railroads of the business of furnishing and servicing sleeping cars The court said that it did not believe it to be "within judicial responsibility or competence" to decide which of the various offerors would provide the most progressive management, and that the question of banker dominance of the railroads or some of them was outside both the record and the issues in the case. It said that it approved the sale because Pullman, Inc., had appeared with the buyer which, having the legal responsibility for providing sleeping cars, was the "most natural purchaser", and because the terms of sale accorded with the Court's judgment.

The court on January 4, 1946, entered a "final order" approving the sale to the railroads, subject to the following conditions: (1) that there should be no interlocking directors as between Pullman, Inc., and any vendee railroad or Pullman and as between Pullman-Standard and Pullman or any vendee railroad; (2) that any new sleeping cars required by Pullman should be purchased only after competitive bidding under applicable regulations of the Interstate Commerce Commission; and (3) that any vendee railroad should purchase any sleeping cars only after like competitive bidding. The order also provided that Pullman and anyone to whom the Pullman stock or assets might thereafter be sold (1) should be bound by all of the provisions of the judgment of May 8, 1944, and (2) should agree to enter into a contract to supply, as available and upon proper terms, any of its excess sleeping cars to a railroad desiring them.

The agreement on the part of the purchasing railroads contemplates that for an "interim period" of three years expiring not later than December 31, 1948, Pullman will operate, service and maintain all of its present cars. At the end of that period Pullman will own, of its present cars, only the heavyweight cars which were not regularly assigned on or after January 1, 1941. All other cars, both lightweight and heavyweight will pass into the ownership and control of the

individual railroads to which they were previously assigned. Pullman will then become a sleeping-car "service" corporation except for its obligation to keep a pool of cars to meet seasonal or peak demands if cars are available. It is further contemplated that after the "interim period" this service corporation will no longer be railroad owned.

It is the contention of the Government that:

1. The plan approved by the court defeats the purpose for which this suit was instituted and substitutes for a monopoly which has been adjudicated illegal a more powerful monopoly consisting of a combination of railroads doing approximately 98 percent of the sleeping-car business in the United States, contrary to the intent and purpose of the Sherman Act.

2. The Court, after ruling that the defendents held an unlawful monopoly and had been guilty of illegal monopolistic practices, approved a plan for future operations which does not dissipate the effects of the monopoly and the monopolistic practices.

3. The Court erroneously failed and refused to consider the merits of plans offered by other prospective purchasers which would have served more adequately to protect the public interest and satisfy the requirements of law.

THE QUESTIONS ARE SUBSTANTIAL

The plan as approved by the Court grants to a combination of competing railroads a monopoly of the operation, maintenance and servicing of all sleeping cars for a period of three years. The incentive which individual railroads might have to acquire and operate their own sleeping cars if they were not satisfied with an independent company is eliminated because each railroad shares in the profits of the jointly owned company. Obviously, no new independent company could enter the field. Thus the public is deprived of the benefits of even potential competition in the furnishing of sleeping-car service. Likewise, it is patent that the railroads, which have heretofore fostered coach competion against the independent company operating sleeping cars, will not feel the same competitive urge as against a company in which each railroad is a part owner. As a result, the evils of monopolistic control are enhanced during the period for which the railroads propose to enjoy the monopoly granted to them by the Court. We submit that the plan in its entirety violates the Sherman Act and is in derogation of the public interest. There is thus presented the question whether this Court should set aside the order approving the plan lest the public interest not be adequately protected by the final adjudication in the court be-

low. *United States* v. *Crescent Amusement Co.*, 323 U. S. 173, 186.

The original decree of the court below appeared to satisfy the two purposes for which this suit was instituted, i. e. (1) establishing competition in the manufacture of sleeping cars, and (2) eliminating the monopoly in the operation and servicing of sleeping cars. The plan for the purchase of Pullman by the combination of railroads tends to nullify the effectiveness of the original decree in both of these particulars. Competition in the manufacture of sleeping cars is unlikely if there is only one available customer. If a concern independent of the railroads owned Pullman there would be two classes of purchasers of sleeping cars, the independent Pullman Company and the several railroads. The effect of the Court's decree is to create a buyer's monopoly in the railroad-owned Pullman Company. It seems improbable that the railroads would seek to purchase new equipment when the effect of such purchases would be to render obsolete equipment in which they would have a present joint interest and eventual individual ownership. In that event, Pullman would be the sole customer. It is true that all parties are required to purchase through competitive bidding but that requirement may be rendered meaningless by skillful drafting of specifications. It is even less likely that competition will result in operating and serv-

icing of sleeping cars under the approved plan. The court attempted to open the door for such competition by striking down the contracts by which Pullman acquired the exclusive right to perform this function. It seems evident that such contracts are not needed to assure exclusive rights as long as the railroads are to be permitted to deal with a company which they jointly own. Further, with railroad ownership in common of Pullman there is no possibility that any independent will be permitted to operate and service sleeping cars in competition with the railroad-owned company. Thus the original defendants are deprived of their monopoly but the monopoly continues to exist and its effect are not dissipated.

The opinion of the district court plainly shows that its approval of the railroad plan was based on the belief that that court was only concerned with providing relief which would effectively prevent the defendants from continuing to violate the antitrust laws. The court refused to consider whether any one of the other three offers for the purchase of Pullman would better serve the public interest or would dissipate more effectively the effects of the monopoly which the court struck down, because it did not believe that it was within "judicial responsibility or competence" to secure for the public the best service obtainable. Therefore, there is a substantial question of great public importance presented to this Court as to

whether a court of equity, having determined that the defendants before it possess an illegal monopoly, is bound to weigh the various plans presented to it and select the plan which in its judgment will best protect the public interest and dissipate the effects of the monopoly.

The industry here involved is in effect a public utility which supplies service to a large portion of the travelling public. The decree in this case will determine the future course and development of that industry. In these circumstances it is of paramount importance that the public interest be adequately safeguarded by the final decision. The court below, over objections by the Government, has approved a plan which raises grave doubts as to the sufficiency of the protection afforded to the interests of the public. These doubts can be resolved only by decision of this Court.

We believe that the questions presented by this appeal are substantial and that they are of great public importance.

Respectfully submitted,

/S/ J. HOWARD MCGRATH,
J. HOWARD MCGRATH,
Solicitor General.

In the District Court of the United States, for the Eastern District of Pennsylvania

Civil Action No. 994. June Term, 1940

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, ET AL., DEFENDANTS

OPINION

Before BIGGS, MARIS, and GOODRICH, Circuit Judges, sitting pursuant to the Expediting Act (Act of Feb. 11, 1903, as Amended, 36 Stat. 854, 1167; 15 U. S. C. §28)

GOODRICH, Circuit Judge. This is a proceeding brought by the United States to restrain alleged violations of §§ 1 and 2 of the Sherman Act and §3 of the Clayton Act.[1] The principal corporate

[1] "SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . . Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding $5,000, or by imprisonment not

defendants are the Pullman Company, the Pullman-Standard Car Manufacturing Company and Pullman, Inc. A description of the corporate defendants and the relation of the individual defendants therewith are found in the stipulation of facts entered into between the parties, found as facts by the Court. They need not be repeated here.

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exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209, as amended, 50 Stat. 693; 15 U. S. C. § I.

"SEC. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court." 26 Stat. 209 15 U. S. C. § 2.

"SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 731; 15 U. S. C. § 14.

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The Pullman Company is today, and has been since 1900, except for railroads which have performed their own sleeping car service, the only person or company in the United States engaged in the business of furnishing sleeping car service to the railroads of the United States. Plaintiff does not contend that the mere fact that one engages in an interstate commerce business in which he has no competitors makes him a violator of the Sherman Act. It contends rather that Pullman is the sole entrepreneur because of the successful completion of a plan formed in the early days of the company's history to eliminate its competitors and its successful arrangement of affairs with contracting railroads to the end that no one else can now get into a position to compete either in manufacturing, furnishing or operating of sleeping cars.

George M. Pullman was the founder of the business which still bears his name. That name has become synonymous with sleeping car transportation in the United States. In 1858 Mr. Pullman arranged with a predecessor of the Alton Railroad to remodel two of its day coaches into sleepers. In 1863 he and Benjamin Field constructed an entirely new sleeping car, the famous "Pioneer", the success of which laid the foundation for the general introduction of sleeping car transportation in America. The Pullman business was incorporated as Pullman's Palace Car Company in 1867.

It serves no useful purpose to detail in this opinion the facts concerning the development of the sleeping car business from 1858 to 1900 already appearing in the findings of fact made by the Court upon the testimony and exhibits or settled by stipulation of the parties. Numerous companies and individuals entered the field. Varying types of arrangements were made between sleeping car companies, including Pullman, and the railroads. Sometimes the furnishing of sleeping car service was a joint affair with the railroad and the sleeping car company both participating. Sometimes it was an out and out contract to provide a service in sleeping cars. Our findings of fact state that there was competition to some extent between sleeping car companies for the business of the traveling public at one time. While the Wagner Palace Car Company's sleeping cars were used on what are now known as the New York Central lines and the Pullman Company's sleepers were used on the Pennsylvania lines, obviously the passenger from New York to Chicago had his choice of competing sleeping car services.

More important was the competition, or possibility of competition, among sleeping car companies for the business of supplying the various railroads with sleeping cars and sleeping car service. There was such competition. Officers of the Pullman Company stated this as a fact before the Interstate Commerce Commission. Pullman at

one time or another lost the business of the Central Vermont, the Chicago & Northwestern, the Chicago, St. Paul, Minneapolis & Omaha, the Missouri, Kansas & Texas, the Michigan Central and the New York, Ontario & Western to Wagner. At other times it had lost its business on the Richmond & Danville and on a portion of the Central Railroad of New Jersey to the Union, Mann and Woodruff companies. It is true that not all of the various sleeping car companies competed with each other for the business of all the railroads. In some instances, their operations were non-competitive, one's operation beginning at the geographical point where the other's service ceased. But there was some competition and always the possibility of more, depending upon the aggressiveness of the management of the various companies, where several sought the sleeping car business of the railroads.

At an adjourned special meeting of the stockholders of Pullman held on January 31, 1870, the following entry, inter alia, appears in the minutes of the meeting:

> Whereas—It appears to the Stockholders, upon full consideration of the subject, that the importance and value of the Business conducted by this Company very largely depends upon forming continuous lines of Sleeping Car communication, and also upon the absorption of Sleeping Car facilities upon as many Trunk

> Lines of Railway as possible thereby preventing useless competition; * * *

Again, on April 3, 1873, at a meeting ratifying the acquisition of control of the Erie and Atlantic Sleeping Coach Company, the minutes state:

> Whereas—It is deemed expedient to embrace in our system as far as practicable all the through lines between Chicago and New York, * * *

The plaintiff stresses the importance of these recitals; the defendants minimize them. We think they are competent evidence to show defendants' state of mind at the time. The time, of course, was a good while ago, long before the Sherman Act. But if such declarations point in the direction of a path which has been followed continuously since their adoption, it is not unfair to take them as the initiation of a consistent Pullman policy. *The Standard Oil Company of New Jersey* v. *The United States,* 221 U. S. 1, 46–47, 75–76 (1911); *United States* v. *Reading Company,* 253 U. S. 26, 43–45 (1920).

Between 1867 and 1900 the Pullman Company acquired every other sleeping car concern in the United States which had not theretofore gone out of business or had not been acquired by other companies subsequently absorbed by the Pullman Company or by the Wagner Palace Car Company. The last purchase was that of the Wagner Palace Car Company which was acquired in 1899. This

was the only acquisition which was shown to have occurred after the passage of the Sherman Act. We heard a great deal in the evidence concerning the surrounding circumstances of these acquisitions and especially that relating to the Wagner Company. Defendants point out, and the plaintiff concedes, that in no case was the acquisition by Pullman the result of predatory practices such as misrepresentation, temporary price cutting to kill a competitor, or the like. Pullman further says that the price paid in each instance was reasonable and that the overtures which resulted in the acquisition were made by the seller and not Pullman as buyer. Plaintiff disputes the reasonableness of the price paid in some instances, especially in the cases of Central Transportation Company and the Wagner Company.

We do not think that the issue whether defendants have violated the Sherman Act turns upon who initiated negotiations for purchase or whether the price paid by Pullman was high or low. Pullman did buy and whatever the price paid was, it was not too much from Pullman's point of view for it built the units secured into an integrated and successfully operated whole. Competitors were all absorbed.[2]

[2] Some of the railroads of the country operated all or part of the sleeping car business on their lines themselves. They have gradually disassociated themselves from this business. At the time this suit was instituted only a few railroads in the United States were operating any part of their sleeping

If this were all we had in the case we should face the difficult question whether a violation of the Sherman Act is involved where a business enterprise, admittedly engaging in interstate commerce, has acquired the sole possession of the field by absorption, in non-predatory fashion, of all of its competitors. Defendants say that to answer this question in the affirmative is to maintain that one in business competition may do everything except succeed. The plaintiff's position on the point is categorically taken with an affirmative answer to the question. It says that mere possession of exclusive control over a commodity or service constitutes monopolization; a fortiori there is monopolization when such power is obtained by acquisition of competitors. For this conclusion it cites *The Standard Oil Company of New Jersey* v. *The United States,* 221 U. S. 1 (1911); *United States of America* v. *American Tobacco Company,* 221 U. S. 106 (1911); *United States* v. *Reading Company,* 253 U. S. 26 (1920); *United States* v. *Great Lakes Towing Co.,* 208 Fed. 733 (N. D. Ohio, 1913). However, the Court does not feel compelled to rest the decision of this case on the fact of a company acquiring all its

car service. Perhaps the most important exception is the Canadian Pacific Railway Company, which has some Pullman service but also operates its own sleeping cars. Some of the cars of the Canadian Pacific go to points within the United States. The Stipulation of Facts of the parties gives some of the details of this operation for individual roads.

competitors by purchase, the last acquisition being forty-three years ago. While the doctrine of laches does not apply against the United States,[3] we should approach the question of equitable relief with great hesitancy in a case where the last operative fact was nearly half a century old.

The plaintiff's case, however, is not presented in such a closed volume. The contention is that not only did the Pullman Company engross the market through the acquisition of all competitors, but that it has maintained itself since as the sole proprietor of the business of furnishing sleeping car service by devices which have continued and entrenched its exclusive position. Further, it is urged, the business practices of the defendants right up to the time of this law suit are such that only an organization with complete monopolization of the market which it serves could follow them. Such a domination, declares the plaintiff, is the clearest possible example of the practice which the Sherman Act was designed to prevent.

Do the facts show that the defendants are not only the sole proprietors in the sleeping car business, but that their control is such that no one else can enter it? It is not that the Pullman Company or its manufacturing associate, Pullman-Standard, have any exclusive legal rights in the manufacture of sleeping cars. The parties

[3] *Utah Power & Light Company* v. *United States*, 243 U. S. 389, 409 (1917).

stipulate that there are no basic patents standing in the way and that there are several manufacturers in the country ready, able and willing to make sleeping cars if called upon to do so. Nor has the Pullman Company any legal standing to operate sleeping cars on railroad lines without permission of the railroad. In its relation with the traveling public, Pullman is subject to regulation by the Interstate Commerce Commission; its relations with its railroad customers are a matter of contract. And the business about which this suit centers is not that of furnishing sleeping cars to the public, but that of supplying such cars and the service incident to their operation to the railroads of the country. It is in this business that the government contends that the defendants have violated the Sherman Act.

The next step is, then, to examine the evidence bearing upon how the defendants, sole operators in the sleeping car business since 1900, are alleged to have so fortified their position as to repel all possible attempts at competition. The alleged means are various.

The exclusive dealing feature.—A standard provision appearing in most of the contracts offered in evidence, is that Pullman shall have the exclusive right to furnish all the sleeping cars to the railroads. In some contracts, particularly the recent ones, Pullman is expressly given the exclusive right to furnish "the usual service" in

such cars. However, it is clear that it has that right under all these contracts. In the early days of the sleeping car business, this was not always so; contracts were made by Pullman for service on a segment of some railroad's lines where another sleeping car company had a similar contract for service on some other portion. Even now there remain a few instances where railroads continue to furnish their own sleeping car service upon some of their lines. The Canadian Pacific, which runs into United States territory, has a Pullman contract for part only of its sleeping car service. But, with only minor exceptions the country-wide network of sleeping car service is supplied by Pullman Company cars and service and the contracts provide for exclusive Pullman service in the furnishing and operating of sleeping cars.

These facts, in the large not a subject of dispute, have significance in the whole legal picture, though we do not need to draw any conclusion from them alone. No doubt the sole laundry in a town may agree to devote all of its facilities to the service of the local hotel for a year, and the hotel proprietor agree to deal exclusively with that laundry for the contract period. A monopolization and a restraint of trade are involved. In the ordinary case, they are too slight to invoke legal consequences. But when the one rendering the service makes an exclusive service contract with the many others in the whole nation who

have need of such services, the question is certainly different and the answer may conceivably be so too. Admittedly the difference is one of degree but we all understand by now that it is none the worse for that. But no conclusion need be drawn until we look at all the figures in the picture.

Service from Pullman's cars only.—That it is Pullman's policy and practice to furnish sleeping car service only with cars owned by its is undisputed. "The Pullman Company has never held itself out to perform service in sleeping cars owned by others and is not and never has been engaged in such business. * * * The Pullman Company has stated upon inquiries from railroads that its responsibilities in the performance of its sleeping and parlor car services will be discharged only with equipment and organization of its own choice."[4] In other words, the position of the Pullman Company is that if a railroad wishes to avail itself of Pullman sleeping car service, it may have it with such cars as Pullman chooses to provide. That choice is the cars owned by Pullman and for the most part either manufactured by it or its associate Pullman-Standard. "Since 1900, either Pullman Company or Standard has manufactured all new sleeping cars acquired by Pullman Company."[5] Some used cars have been acquired by it in taking over sleeping car service

[4] Stipulation of Facts, page 79.
[5] Id., paragraph 103.

on railroads which formerly furnished their own service with their own cars.

There have been a few exceptions to this practice. The Denver & Rio Grande Western has four specially built cars, two of which are sleepers and buffet lounges which are railroad owned and Pullman serviced.* The Santa Fe and the Burlington each bought some lightweight sleeping cars which, after considerable discussion, were finally leased to Pullman and operated by it on the respective lines. This incident will be mentioned later. Despite minor exceptions, the general policy of Pullman is perfectly clear and has been consistently maintained. Pullman sleeping car service is to be had in Pullman-owned sleeping cars only and Pullman is to make the choice of what kind of cars they are to be and where they are to be obtained.

Defendants say that this is but an instance of a contractor employed upon another's premises stipulating for the use of his own tools in doing the work. Here again, we must guard against a generalization which concludes that because an arrangement is legal for one degree, it is equally so for the whole three hundred sixty. The problem as to the exclusive furnishing of cars is not

* The Denver & Rio Grande Western also owns two sleepers which it purchased from Pullman and rearranged and re-equipped. These are operated and serviced by the Denver & Salt Lake, which is owned by the Denver & Rio Grande Western.

essentially different from that of exclusive dealing with the supplier described above. We are dealing here not with one contractor and one landowner but a contractor who has an arrangement to supply its own choice of sleeping cars to every railroad in the United States. That Pullman in fact controls the furnishing and servicing of sleeping cars is clear, whatever the legal consequence of such control may be. Here again, as with the exclusive dealing arrangement, consideration of the problem of law presented may be deferred until the picture is filled in.

Timing of contracts.—Two points were developed in this connection:

One has to do with the term for which Pullman railroad contracts are drawn. The fact is settled by stipulation. Between 1890 and 1920 the term of most of the contracts was from 15 to 25 years. Between 1920 and 1932 the term of most of such contracts was 15 years, and since 1932 the term of most of such contracts has been five years. It is not covered by the stipulation but we think it clear that the reason for the short term contracts since 1932 was Pullman's fear of finding itself obligated under a long term contract in the face of rising costs and decreasing business.[7]

[7] This was anticipated by the Pullman officials, as early as August 14, 1929. The minutes of the Executive Committee meeting held on that date, read, inter alia: "With the apparent uncertainty regarding the future trend of our operating expenses, Mr. Carry approved a 10-year term in the

As a competition killer the long term contract is an effective weapon. One could hardly have a more favored service contract than an agreement for exclusive dealing, equipment of one's own choosing and a quarter century of time to elapse before one need to be concerned with new terms. Even a patentee is not so secure against the passage of time. Multiply the advantage by the number of railroads with whom Pullman secured service contracts and its position, for the years covered, was impregnable.

The security in long time contracts has been buttressed further by staggered expiration dates. No evidence was shown us that Pullman officers and directors discussed the subject and determined upon a policy of arranging railroad service contracts so that they would expire at dates well separated from each other. The advantage in

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recent renewals of the Union Pacific-Southern Pacific contracts in lieu of the old basis of a 15- or 20-year term, and the management has followed this precedent in preparing the form of contract that has now been submitted to the Rock Island."

* * * * *

"After considerable discussion of contract bases in general, it was the concensus of opinion of the Committee members present that all new operating agreements should be limited to a 5-year term, or if written for a longer period, should carry provision for periodic reconsideration and revision, as the inability to forecast the future trend of economic, financial and traffic conditions render hazardous a continuation of the old practice of committing the Company to operating agreements running for terms of fifteen or twenty years."

bargaining position of Pullman if it could deal with one railroad at a time is too obvious, however, to require discussion either in corporate board meeting or court decision. There is nothing new in the adage: Divide and Conquer. In any event, the contracts through the years did end at different times for different roads, with advantage to Pullman's bargaining position. When Pullman was faced, for one reason or another with joint or simultaneous negotiation with a group of roads, it experienced additional difficulties and inter-office correspondence among its officers speaks with weariness of the tendency of the roads to "gang with" others in their demands.[8]

[8] Thus it was stated in a letter from Mr. Crawford to J. R. Merron, dated July 10, 1931: "I imagine they will come back at us however, with a proposal to have the expiration date of both contracts set at the same time, instead of spaced six months apart as they were under the old contract. At present we have proposed to the Pennsylvania a 2½ year term running to December 31, 1932, and a 3-year term to the New York Central running to December 31, 1933. With short terms such as are now proposed, there isn't much to be said against a coincident expiration date for these two big contracts, except that we would rather have them separate. With the old New Haven contract also expiring December 31, 1932, there is quite an evident possibility of group action here but recent experience has shown how the roads can bluff along under a new contract status, if they wish to gang with some other road in Pullman contract negotiation. This question of the policy of making a stand on the question of spreading the expiration dates of these important contracts is one of the things on which I especially want to get your judgment, and I am bothering you with this detail in advance of seeing you next week so you might have opportunity to

Feasibility of alternatives open to railroads.—Pullman calls attention to one point very strongly. After all, it tells us, no railroad need use Pullman service unless it wants to do so. Pullman has no legal right to set foot on railroad property without the owner's permission. It is the railroad, not Pullman, which has the public duty to provide passengers on trains a place to sleep. If any railroad does not want Pullman service in meeting this obligation, the argument continues, it is perfectly free at the expiration of any contract period, to hire someone else to perform the service, or do the job itself, as it pleases.

To this the plaintiff responds that while the argument sounds plausible, no other course but

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give some thought to the thing in advance of my talk with you."

Again, in an unsigned letter dated September 26, 1931, to A. O. Choate, apparently written by Mr. Crawford, there appears: "There was some attempt to discuss period of contract in this joint meeting [with the Pennsylvania and New York Central contract committees] but I declined to do so on the definite statement that we were negotiating individual contracts with individual railroads, and when Mr. Ingersoll said something about his contract ending in 1932 I reminded him that that was not the offer that he had on the table. If and when it comes to notifying these two roads of acceptance of the proposed amendment I would propose to make it clear that this amendment has not changed our previous definite offer of a contract period ending December 31, 1932, for the Pennsylvania and December 31, 1931 [1931 changed to 1933 in pencil] for the New York Central. We will probably have a battle on this point before we get through with it, and I think your ideas in favor of a 5-year term may yet be enforced if we want to make a stand on it."

use of Pullman cars and service on such terms as it can get is a practicable one for the railroads. We think that this response is correct in point of fact though the considerations which lead to the conclusion vary among the different roads. The point is important and merits some discussion. The alternative at the present time is not that the railroad may turn to some service company other than Pullman to do the job. There have been no others in the field since Pullman bought out Wagner more than forty years ago. The alternative is, rather, that the railroads either separately or together, run their own sleeping car service.

If a railroad is to do its own sleeping car business it must, of course, have sleeping cars. If new cars are to be furnished they will as a matter of commercial necessity be the lightweight type. Pullman itself, has not built or purchased any of the older type heavyweight cars since 1931. New lightweight cars cost, at the beginning of the war, about $80,000 each. It is highly unlikely that they, or new cars of any kind, can be manufactured or purchased during the war emergency. It is possible that if lightweight cars were to be produced after the war in large numbers, the unit price could be considerably reduced. Even at $60,000, to provide an all new lightweight car fleet for any railroad would demand an enormous flow of capital into that industry. The Boston & Maine system, for example, uses in non-peak pe-

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riods approximately from 54 to 74 cars daily; the Chesapeake & Ohio from 46 to 69; the Missouri, Kansas & Texas from 49 to 55. In the case of larger roads, such as the Pennsylvania and New York Central, the minimum requirements are considerably larger. On the Pennsylvania alone, Pullman has put in operation in the past five years 142 lightweight cars, at an estimated average cost of $80,000 per car, the contract calling for 200 such cars. The situation with respect to the New York Central is similar. The necessary investment at $60,000 per car for non-peak service for the smaller roads mentioned would be:

Boston & Maine Railroad, $3,240,000–$4,440,000.

Chesapeake & Ohio Railway Company, $2,760,000–$4,140,000.

Missouri, Kansas & Texas Railway Company, $2,940,000–$3,300,000.

If used cars are to make up part of a railroad's fleet they can only be purchased from Pullman, for that company owns nearly all that there are. Opportunity to purchase used cars of right was given in some instances only in case Pullman cancelled the contract. Many of the contracts offered in evidence by stipulation contain no provision on the right to purchase. Contracts with the larger railroads, such as the Pennsylvania and New York Central, provide for the purchase of cars upon the expiration of the agreements. Contracts executed after this suit

was brought give the railroads the right to purchase upon cancellation, expiration or termination of the contract. However, in cases where the question has arisen, Pullman has never been willing to sell cars to a railroad at their depreciated value, even though such depreciation has been in effect paid by the roads as part of their payment for Pullman service.[9] In no case has the price quoted been less than reproduction cost new less depreciation. It is clear, therefore, that the economic possibility of a railroad at this state of the matter going into the sleeping car business is a real one only for these roads in a strong financial position. The Pennsylvania says it can do it and doubtless can, though with very great expenditures and the adding of many new employees to its organization. Smaller roads, like the Denver & Rio Grande Western, Seaboard Air Line and Wabash, think that as an abstract financial proposition, they could make it, but consider it impracticable as an economic reality.

Even if a railroad could buy the cars it needed for ordinary day to day use there is still the problem of extra cars for peak loads. All roads have certain periods when the demands increase

[9] A usual provision in Pullman contracts is that Pullman shall first retain from the sale of tickets a sum equal to its "Expenses of Operation" plus an initial return of $1000 per car per annum. "Expenses of Operation" are defined to include, inter alia, depreciation.

sharply. But in some, like the Missouri Pacific, Baltimore & Ohio, Southern Pacific and the Pennsylvania, the variation, while perceptible, is comparatively slight throughout the year. Others, like the Florida East Coast, Seaboard, Boston & Maine, Burlington and Northern Pacific have a large amount of seasonal passenger travel in extreme peaks and deep depressions. For instance, the Florida East Coast Railway's requirements may vary from 319 cars in the height of the season to 28 in the dull season. Conversely, those of the Boston & Maine go from a maximum of 173 in summer to a minimum of 54 in winter.[10] The pool of sleeping cars that can be shifted from one road to another as demands vary is called for by sound economic policy. The plaintiff in this suit does not deny this fact and this Court appreciates it fully. It is relevant to be considered in this connection when the practicability of the operation of any railroad's sleeping cars is to be considered.

There are two other factors which bear upon the feasibility of a railroad's alternative to do

[10] The figures are for 1940. The seasonal variations of the two roads were also shown on the basis of the percentage which the revenues accruing in a particular month normally bear to the total of the year. Thus considered in the case of the Florida East Coast Railway, 71.5% of its revenues accrues in the months of January to April inclusive; 50.9% of the Boston & Maine's revenues accrues in the four months of June to September. These figures are based on averages of the months from January, 1929, through December, 1940.

its own sleeping car business. Through-line sleeping car service is undoubtedly regarded by the public as essential. This is not a consideration for the Pennsylvania in carrying a passenger from New York to Chicago or for the Santa Fe in carrying him from Chicago to the west coast. But a passenger from New York to Miami travels from New York over the Pennsylvania to Washington, the Richmond, Fredericksburg and Potomac to Richmond, the Atlantic Coastline to Jacksonville and the Florida East Coast to his destination. Or if he were going to Miami from Chicago he would ride on the Illinois Central to Memphis, over some leased lines between Memphis and Birmingham, the Central of Georgia, the Atlantic Coastline and the Florida East Coast Railway. We cannot conceive that the traveling public would submit to sleeping car changes each time the traveller left one railroad line and continued his journey on another. Through service is a modern essential, but most railroads cannot, by themselves, provide such through service.

Finally the government points out, and we think with correctness, that the railroads have, at the present time, a financial stake in the Pullman system. They have paid their pro rata share in depreciation on all the Pullman cars. They have paid the Pullman Company's amortization for high-speed betterments on Pullman

cars. They are obligated to amortize $20,864,-483.33, the agreed installation cost of air conditioning for sleeping cars, of which amount $17,841,054.86 had been paid as of the close of 1940.

We think it clearly demonstrated that measured in terms of economic feasibility most of the railroads of the country could not own and operate their own sleeping cars at the present time as an alternative to Pullman service. To conclude upon this phase of the case: The evidence shows that the Pullman Company by 1900 became the sole proprietor in the field of furnishing sleeping car service to the railroads. This was done both through its own superior aggressiveness and by buying out weaker competitors as and when the opportunity offered. This exclusive position has been maintained by the combination of the various elements just described. There is no other competitor in the field nor is there for most railroads any possible alternative for other sleeping car arrangements except a contract with the Pullman Company on the best terms that can be secured.

In addition to the foregoing, plaintiff's case has been presented to us with evidence on several other subjects having to do with the operation of the defendants and their business dealings with the railroads. The defendants' evidence, in turn,

has replied to the points made by the plaintiff. An instance of what is being referred to is the very considerable amount of testimony on both sides on the subject of Pullman's charge for depreciation of sleeping cars as they are used year by year. The government says that the depreciation charge is too high and imposed an additional burden on Pullman's railroad customers who had to pay out to Pullman this amount before they should have been called upon to do so. The result is an increased profit to Pullman because it has, in effect, collected money before it was due and had the use thereof although not entitled to it.

Assuming for the moment the preponderance of the evidence by plaintiff upon this point, how does the fact thus proved tend to show that the defendants have violated the Sherman Act? We do not think that over-generous depreciation charges or too high a price charged for air conditioning apparatus are methods of restraining trade or monopolizing it any more than a clothing merchant restrains trade if he charges a customer too much for an overcoat. We do think, however, that showing a group of such practices is relevant while not themselves constituting acts which violate the Sherman Act. They do tend to show that a concern which is able to impose such conditions has a monopolistic control of its market and that whatever concession its customers obtain becomes a

matter of grace from the monopolist and not from the pressure of free competition.

The sum total of the instances mentioned bears out the government's position as above interpreted. The various points will be stated very briefly.

Depreciation has already been mentioned. We think that in both depreciation on cars and on air conditioning apparatus, the depreciation rate which the railroads were called upon to pay Pullman was exceedingly high and that Pullman was able to maintain it even as against the opposition of so powerful a customer as the Pennsylvania Railroad.

With regard to repairs, we believe that Pullman in some instances has charged, as repairs to be paid for out of earnings, expenditures upon equipment which were, in essence, capital expenditures extending the service life of the vehicle on which they were made.[11]

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[11] A good illustration is the El Monte, a car assigned to the Pennsylvania road. On this car, which was 20 years old and fully depreciated, an expenditure of $19,527.85 was made, of which $18,706.34 was charged to operating expenses and $821.54 to capital accounts. The car prior to the "general repairs" had 10 sections, 1 drawing room, and two compartments; afterwards 10 sections and 3 double bedrooms. In an explanation to the Pennsylvania, which had questioned the charge, the repairs were particularized to include "Change of Plan," "Ordinary Classified Repairs," "Steel Plates Renewed," "Upholstery Renewed," "Steel Roof Renewed," "Re-

We think that imposing 75% of the air conditioning costs upon the railroads showed Pullman to be in a position to dictate terms to its customers which could not have occurred in a competitive market. The same is true with its reluctance to enter or permit its railroad customers to enter, so far as sleeping cars are concerned, the lightweight car field.

We find a further indication of monopolistic control in Pullman's policy with regard to guarantees exacted from its railroad customers. This shows with particular clarity in the case of the railroad lines where the returns at profit-making levels were not uniform. Pullman has successfully insisted on such guarantees from the road as would insure Pullman an operating profit on any cars furnished and this regardless of the general state of the industry or business in the country.

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finishing Interior," "U. C. B. Brakes," "Lighting Fixtures," "Sash," "Berth Curtains," "Carpet."

A memorandum to Mr. Taylor reveals further cases:

Car name	Class	Date built	Year given general repairs	Cost of general repairs
Clan Cameron	Sleeper	June 1910	1932	$15,629.72
Dimondale	do	Oct. 1911	1931	14,224.93
Emerald Hill	do	Feb. 1913	1934	23,874.78
Emerald Summit	do	Oct. 1912	1934	24,478.03
Villa Clara	do	Dec. 1911	1931	17,296.95
Villa Ease	do	Mar. 1911	1931	17,128.98
Villa Flora	do	Dec. 1911	1931	17,404.17
Villa Martha	do	Nov. 1911	1931	17,742.02
Villa Rest	do	July 1910	1931	17,710.18
Villa Rosa	do	Dec. 1911	1931	17,578.30

Relevant also is the fact that the Pullman business enterprises have been and are intimately associated with other large scale businesses of the country, especially railroad transportation, through a number of common directorates. Thus H. S. Vanderbilt and George Whitney, directors of the New York Central, are also directors of the Pullman Company and Pullman, Inc.[12] The association with the Pennsylvania Railroad is through directors D. R. McLennan and R. K. Mellon who are also directors of the two Pullman companies as are J. R. Morron, a director of the Alton and Baltimore & Ohio railroads, and H. S. Sturgis, a director of the Delaware, Lackawanna & Western Railroad Company.[13]

[12] Mr. Vanderbilt also is disclosed as a director of Beech Creek, Boston & Albany, Canada Southern, Chicago & Northwestern, Chicago, St. Paul, Minnesota & Omaha, Cleveland, Cincinnati, Chicago & St. Louis, Detroit, Toledo & Milwaukee, Hudson River Connecting, Indiana Harbor Belt, Michigan Central, New Jersey Junction, New York & Fort Lee, New York & Harlem, Pittsburgh & Lake Erie, Rutland, St. Clair & Western, St. Lawrence & Adirondack, Shenango Valley, Toledo & Ohio Central, Wallkill Valley, W. Shore, Pittsburgh, McKeesport & Youghiogheny railroads by Poor's Directory of Directors—1940 Edition.

[13] Represented also on Pullman's Boards of directors were officials and directors, inter alia, of the Mellon National Bank, J. P. Morgan & Co., Inc., First National Bank of New York, U. S. Steel Corp., Carborundum Co., Aluminum Co. of America, Gulf Oil Corp., United Petroleum Secur. Corp., Ethyl Gasoline Corp., Consolidated Edison Co. of N. Y., Koppers-United Corp., Armour & Company, American Tel & Tel., American Can Co., Grat Amer. Indemnity Co., Westinghouse Airbrake Co., E. I. duPont de Nemours & Co., Eastern Airlines and General Motors.

The significance of such interlocking directorates is not that their existence, by themselves, constitutes a violation of the Sherman Act. They did raise problems for Pullman in connection with the Clayton Act and the evidence shows concern manifested by Pullman's officers to find a way that they considered valuable directors could be retained without running afoul of that statute. Aside from this, however, the advantage of having persons of business prominence and influence ultimately associated in the Pullman enterprise, especially when such persons had their connections directly with railroads or with the source of railroad financing is clear. Standing alone it does not constitute a violation of the Sherman Act, but it is significant for consideration as one of the figures in the whole picture through which a complete control of sleeping car transportation was accomplished and is maintained.

Not only does Pullman have exclusive service contracts to furnish railroads with sleeping cars and sleeping car service, but through these contracts it is able to control and does control the manufacture of sleeping cars throughout the United States. In the early days of the company a considerable number of cars was purchased from outside manufacturers. The next step was the establishment of a manufacturing plant, in 1881, by the Pullman Company at Pullman, Illinois, where from that year on, with but a few minor exceptions, all new cars used by the

Company in furnishing Pullman service, were made by the company itself. Subsequently, as the findings of fact show, the manufacturing business was separated and transferred to a separate corporation. No evidence has been shown that the Pullman Company or Pullman, Inc., has ever entered into any express exclusive dealing contract with the present Pullman-Standard or its predecessor company. But it is perfectly clear, indeed not disputed, that since the manufacturing department of Pullman was established new cars have not been bought by Pullman from any other manufacturer. While corporate identities of the Pullman Company, the operating company, and Pullman-Standard are kept separated, both are owned by Pullman, Inc. Pullman-Standard supplies all the sleeping cars that Pullman uses. Pullman supplies all the sleeping cars which the railroads use. Other companies could make sleeping cars as the stipulation shows. But they can hardly hope to get a chance to do so, with the expectation of having them used on railroads, where the control of Pullman service is in the hands of those who use only Pullman made cars. That this control is complete is shown in the experience of both the Burlington & Quincy and the Santa Fe who had gone out into the market and bought cars designed and built by the Budd Manufacturing Company and which the railroads wished to try out in an experiment

for attracting business to the roads. After negotiations Pullman did accept certain of these cars, under a lease arrangement, for service and operation. But the Pullman made it exceedingly clear that thereafter all lightweight cars which it would operate and service would have to be furnished by it.[14] With such an unbroken record of exclusive dealing with its own manufacturing department or ally we do not need evidence of an express contract to conclude that it is understood between the parties that Pullman operated sleeping cars are to come from the manufacturing division of the Pullman enterprise only. What parties do, over a course of time, is surely as

[14] In a memorandum to Mr. Crawford, dated July 28, 1936, Mr. Taylor frankly stated Pullman's position. "Mr. Engel then asked me what our position would be as to additional new-type lightweight cars which the Santa Fe undoubtedly would require in the very near future; he said this would probably run to not less than 6 additional trains. I told him, in accordance with my understanding with you, that The Pullman Company would not be willing to lease from the Railway Company any additional new-type lightweight cars built by outside car builders; he then called attention to the fact that their operating agreement expires Dec. 31, 1937, in less than eighteen months, and asked what our position would be if they should insist upon an additional fleet of stainless steel lightweight cars. I told him that if they insisted upon having additional stainless steel cars and we were not willing to furnish such cars, and as they probably would not be delivered, if ordered outside, until some considerable time after the first of next year, we probably would not endeavor to stand on our rights under the contract and block them from operating the cars themselves but would agree to a cancellation of the contract."

demonstrative of their understanding and intent as what they say. It is settled, of course, that an agreement may be found in a course of dealings or other circumstances as well as through exchange of words, *Frey & Sons, Incorporated* v. *Cudahy Packing Company,* 256 U. S. 208 (1921); *United States* v. *A. Schrader's Son, Inc.,* 252 U. S. 85 (1920). As D. A. Crawford, defendant's president, himself, said: "The Court should look to what was done, not to what was talked about."

APPLICABILITY OF THE SHERMAN ACT

The facts presented in evidence constitute, in our opinion, an infraction of the monopoly section of the statute, that is § 2. We have here defendants who are not only the sole purveyors of sleeping car service, but who got themselves into that position by buying out competitors with the express intent, as recorded in their own corporate minutes, of eliminating what they pleased to call "useless competition." Then having acquired sole possession of the field they have so arranged matters that no one else can enter it. This is equally true of the business of manufacturing sleeping cars as it is of the business of servicing sleeping cars, graphically described by the defendants' counsel as "chamber maid service". The economic and physical obstacles present to prevent an individual railroad from escaping the Pull-

man monopoly by itself, supplying service are as great as the geographical obstacles which the Court found determinative in *United States* v. *Terminal Railroad Association of St. Louis,* 224 U. S. 383 (1912).

Monopoly being clearly established any number of judicial statements can be found to the effect that instances of its baleful practices need not be shown to prove that the statute is violated. Benevolent monopoly is no less a monopoly because it is benevolent. A fortiori evidence that defendants know their business and run it in an efficient manner or even that their customers are not displeased is beside the legal point.

In addition to the existence of monopolistic power, however, there has been shown a series of instances of its exercise as, for example, the exclusion of the Budd products from sleeping car business; the insistence on all or nothing clauses in contracts; the obdurate resistance to changes in type of cars pressed for by railroad customers; the guaranty clause to protect Pullman in matters of earnings. These we take it are monopolistic practices. They show defendants' control of the market; they are also evidence of violation of § 1 of the statute concerning restraint of trade. As the Court says in *United States* v. *Socony-Vacuum Oil Co., Inc.,* 310 U. S. 150, footnote, page 226 (1940): "* * * the two sec-

tions overlap in the sense that a monopoly under § 2 is a species of restraint of trade under § 1."[15]

The Government has contended throughout this case that it is unique on its facts in presenting a situation where the monopoly is 100% complete. With this contention, at the end of our consideration of the evidence presented, we are constrained to agree. We find a complete monopolization in the business of furnishing sleeping cars to railroads. This applies to the servicing of the cars

[15] The whole paragraph had best be quoted. It reads:

"The existence or exertion of power to accomplish the desired objective (*United States* v. *United States Steel Corp.*, 251 U. S. 417, 444–445; *United States* v. *International Harvester Co.*, 274 U. S. 693, 708–709) becomes important only in cases where the offense charged is the actual monopolizing of any part of trade or commerce in violation of § 2 of the Act. An intent and a power to produce the result which the law condemns are then necessary. As stated in *Swift & Co.* v. *United States*, 196 U. S. 375, 396, '. . . when that intent and the consequent dangerous probability exist, this statute, like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result.' But the crime under § 1 is legally distinct from that under § 2 (*United States* v. *MacAndrews & Forbes Co.*, 149 F. 836; *United States* v. *Buchalter*, 88 F. 2d 625) though the two sections overlap in the sense that a monopoly under § 1. *Standard Oil Co.* v. *United States*, 221 U. S. 1, 59–61; *Patterson* v. *United States supra*, p. 620. Only a confusion between the nature of the offenses under those two sections (See *United States* v. *Nelson*, 52 F. 646; *United States* v. *Patterson*, 55 F. 605; *Chesapeake & O. Fuel Co.* v. *United States*, 115 F. 610) would lead to the conclusion that power to fix prices was necessary for proof of a price-fixing conspiracy under § 1. Cf. *State* v. *Eastern Coal Co.*, 29 R. I. 254; 70 A.1; *State* v. *Scollard*, 126 Wash. 335; 218 P. 224."

and the furnishing of such cars both of which are completely controlled by the defendants. Through the furnishing of the cars under the exclusive service contracts the furnisher has complete control of the sleeping car manufacturing industry as well. The immaterial leaks in this watertight arrangement have been with its knowledge and consent, albeit the consent was given grudgingly. We have found no other case among the many to which we have been referred presenting such effective and complete monopolization of a given field by the sole proprietor in that field. This being so, we do not feel that there is point in the expenditure of paper and ink in discussing the applicability of cases where the court struggled with the question of the legal effect of partial control of a given market. The very point of such cases is to determine whether what has been done has gone far enough. Here what has been done has gone as far as it is possible to go, that is complete domination of the market.

The able argument for the defendant has, naturally enough, emphasized the legal propriety of various aspects of Pullman business in relation to its railroad customers. Thus it points out that every railroad company has an exclusive right to the transportation of passengers over its line and that it has a legal right, also, to employ Pullman or someone to furnish part of its service on terms mutually agreed upon. We, ourselves, will

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go one step further and readily agree that the Supreme Court has upheld the legality of one such exclusive contract with one railroad.[16]

Again, along this same line, it is emphasized that Pullman has a lawful right to enter into a contract for the performance of services with its own employees and its own tools. This, too, as a dissociated proposition probably would not be controverted by anybody. But it is clear that in a case like this it is the court's duty to look at the whole picture, not individual figures in it.[17] We

[16] *Chicago, St. Louis and New Orleans Railroad Company* v. *Pullman Southern Car Company*, 139 U. S. 79 (1891).

[17] "It is not essential that these contracts considered singly be unlawful as in restraint of trade. So considered, they may be wholly innocent. Even acts absolutely lawful may be steps in a criminal plot. *Aikens* v. *Wisconsin*, 195 U. S. 194, 206. But a series of such contracts, if the result of a concerted plan or plot between the defendants to thereby secure control of the sale of the independent coal in the markets of other States, and thereby secure control of the sale of the independent coal in the markets of other States, and thereby suppress competition in prices between their own output and that of the independent operators, would come plainly within the terms of the statute, and as parts of the scheme or plot would be unlawful. Thus in *Swift & Company* v. *United States*, 196 U. S. 375, 396, where a plan or scheme consisting in many parts or elements was averred to constitute a combination forbidden by the act of July 2, 1890, it was said:

"'The scheme as a whole seems to us to be within reach of the law. The constituent elements, as we have stated them, are enough to give to the scheme a body and, for all that we can say, to accomplish it. Moreover, whatever we may think of them separately when we take them up as distinct charges, they are alleged sufficiently as elements of the

have endeavored in the earlier portions of this opinion to assemble that whole picture composed as it is of many parts, some of which singly might be without legal significance. The sum total, it is clear, constitutes a complete domination by the defendants of a limited but important market. They have full control, they have the power to exclude, they have exercised the power and they have by all this violated the provisions of the Sherman Act.

RELIEF

The Court's conclusion being that there has been a violation of the Sherman Act the final question is the equitable relief to be had in this suit. Counsel for the plaintiff have repeatedly suggested that in case of a finding of violation, the questions concerning relief might be referred to a master or one of the regulatory commissions to hold hearings at which experts, governmental or private, could state their views regarding proper organization of the business of passenger transportation in the United States. The

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scheme. It is suggested that the several acts charged are lawful and that intent can make no difference. But they are bound together as the parts of a single plan. The plan may make the parts unlawful.'" *United States* v. *Reading Company*, 226 U. S. 324, 357–358 (1912).

See also, *United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 979 (S. D. N. Y. 1916) appeal dismissed, 249 U. S. 621 (1919); *United Shoe Machinery Co.* v. *LaChapelle*, 212 Mass. 467, 99 N. E. 289, 293 (1912).

Court is not inclined to view favorably so ambitious a program. It does not regard itself as a legislative committee nor a regulatory commission. A law suit has been brought, factual and legal conclusions reached and the relief to be afforded should be that which the Court can both understand and apply.

On the other hand, we do not mean to be peremptory regarding the appropriate decree. Counsel for both sides are entitled to be heard with regard to its form; it may be that additional testimony with regard to some of the points will be helpful. If so, we do not want to say in advance that we do not wish to hear it.

The object to be sought, for the convenience of the parties as well as the Court, is a decree which will embody the necessary elements of suitable equitable relief and require a minimum of supervision by the Court and reports and data by the parties. In other words, the Court should give a decree in which the duty of the defendants is outlined as explicitly as possible so that both the defendants and others dealing with them may know what their responsibilities are.

Several things obvious for consideration in this connection the Pullman Company, through its officers, if not by corporate action, has already expressed its willingness to do. Indeed some of them, it is said, have already been put into practice by Pullman. We agree with the govern-

ment's contention that this does not make an order requiring such practices less appropriate. If the things done are indicated to remove certain company activities from the prohibition of the Sherman Act, a decree requiring them is not less appropriate because the company's new policy, as distinguished from the old, may already include them. The decree will insure the continuance of such reformed practices.

We see no necessity for orders directed against individual defendants by name. Where corporate practices are forbidden or ordered the usual inclusion of the corporate defendants, and their directors and officers is sufficient.

Among the matters in the mind of the Court which it deems relevant for inclusion in a proposed decree are the following:

1. The separation of the business of the Pullman Company from that of Pullman-Standard Car Manufacturing Company and the simplest method of accomplishing that separation.

2. The establishing of the right of a railroad to purchase used sleeping cars from the Pullman Company.

3. The terms to be included in a direction that Pullman shall be required to operate and service sleeping cars designed and built by any manufacturer and tendered to it for operation and service.

4. The right of any railroad which wishes to operate all or a portion of its own sleeping car business so to do, regardless of existing sleeping car contracts with the Pullman Company.

5. The establishment of the obligation of the Pullman Company to furnish through-line sleeping car service to any railroad or group of railroads.

6. The elimination of exclusive dealing contracts between the Pullman Company and the railroads and the abrogation of such provisions in existing contracts.

The formulation of a decree will await further discussion and hearing upon these points and others which may be suggested by the parties.

In the District Court of the United States, for the Eastern District of Pennsylvania

Civil Action No. 994. June Term, 1940

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, ET AL., DEFENDANTS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Before BIGGS, MARIS, and GOODRICH, Circuit Judges, sitting pursuant to the Expediting Act (Act of Feb. 11, 1903, as Amended, 36 Stat. 854, 1167; 15 U. S. C. § 28)

FINDINGS OF FACT

1. Beginning as early as 1836 the railroads for several years made sporadic efforts to provide sleeping accommodations for their passengers by the operation of crude bunk cars. During that period the railroads did not develop a practical sleeping car.

2. In the late 50's and 60's, in response to public need therefor, a number of railroads and sleeping

car companies began to provide sleeping car service in cars constructed under various patents.

3. The Pullman sleeping car business began in 1858 when George M. Pullman, in association with Benjamin Field, secured the first contract for operation of sleeping cars in the United States, and constructed existing coaches into sleeping cars, which he operated on the Chicago and Alton.

4. The construction of an entirely new sleeping car, the "Pioneer", by George M. Pullman and one of his associates in 1863 marked the beginning of the modern sleeping car. This was shortly followed by the construction of other improved types of cars. These cars were given wide publicity in the press, and gave great impetus to the Pullman sleeping car business.

5. George M. Pullman prior to 1867 secured several sleeping car contracts with important railroads in the middle west and began operation under them. He also organized and secured control of Pullman, Kimball & Ramsey Sleeping Car Company, which operated sleeping cars on several important lines in the southeast.

6. In 1867 George M. Pullman organized Pullman's Palace Car Company, now the Pullman Company, and assigned to it most of the operating agreements which he had previously secured. All of the business acquired by or through George M. Pullman was ultimately lodged in this company.

7. Between 1867 and 1900 there were numerous companies engaged in the business of furnishing

and operating sleeping cars for railroads, and these companies were to some extent in competition with each other and with the Pullman Company for the business of furnishing sleeping car service to railroads and were to a lesser extent in competition with each other and with the Pullman Company for the business of furnishing sleeping car accommodations to the public.

8. The Pullman sleeping car business expanded very rapidly between 1867 and 1875, and at the end of that period Pullman Company was carrying on most of the sleeping car business in the United States.

9. Pullman Pacific Car Company was formed in 1868. It took over an agreement which George M. Pullman had secured from the Union Pacific Railroad Company in 1867 and operations performed by him under that agreement. At the outset the Union Pacific owned a majority of the stock of the Pacific Company, but it was controlled by the Pullman Company through common officers and a substantial amount of stock from the date of its organization. All of the stock of that company was acquired by the Pullman Company and operation taken over by it in 1871.

10. In 1870, Pullman Company leased the properties of the Central Transportation Company, whose principal operations were conducted on the lines of the Pennsylvania Railroad, for a term of 99 years and secured an assignment of its

patents. Later, an agreement was entered into reducing the rental to be paid under the lease. Much litigation between the parties subsequently ensued, at the end of which the lease was held by the courts to have been terminated as of 1885, and the Pullman Company was required to pay the Central Transportation Company the value of the leased properties as of that date.

The Pennsylvania Railroad, which controlled the Central Transportation Company, wanted to substitute "Pullman" cars for those in operation on its lines, and also wanted the traffic benefits that would flow from a connection with the sleeping cars operated by Pullman on the Union Pacific.

The Pullman Company leased the Central Transportation Company properties in order (among other reasons) to extend its business into the central eastern territory where it was not then operating, to secure a through route to the Atlantic seaboard to connect with its operations on the Union Pacific, and to settle patent litigation between it and the Central Transportation Company whose patents it was infringing.

11. In 1870 Pullman Company also leased the properties of Southern Transportation Company, a subsidiary of Central Transportation Company, for a period of 99 years. The operations of the Southern Transportation Company did not overlap the operations of any of the Pullman

companies. The leasing of these properties enabled the Pullman Company to extend its operations in the southeast and to settle patent litigation which threatened the existence of Pullman, Kimball & Ramsey Company. This lease was terminated in 1877 when Pullman Company purchased all of the stock of the Southern Transportation Company.

12. Indianapolis & St. Louis Sleeping Coach Company was a joint stock association which operated sleeping cars between Terre Haute and Columbus, under a contract dated October 10, 1866, between Frederick M. Colburn and Columbus & Indianapolis Central Railway Company and under another contract with Terre Haute and Indianapolis Railroad Company. Because of these contracts a suit was started to prevent operation of Pullman cars over these railroads under contracts which Pullman Company had acquired from Central Transportation Company. In order to settle this litigation, Pullman Company agreed to purchase the assets of the Indianapolis & St. Louis Sleeping Coach Company at their appraised value. The sale was effected in 1871.

13. In 1872 Pullman Company purchased two-thirds of the capital stock of Erie & Atlantic Sleeping Coach Company, which had a contract for operating sleeping cars on the lines of the New York, Lake Erie and Western Railroad

Company, a predecessor of the present Erie Railroad. The Erie & Atlantic Sleeping Coach Company confined its operations to the lines of the Erie. In acquiring control of this company Pullman Company was motivated by a desire to extend its business over a railroad on which it had not previously rendered service, and also to provide a safeguard against the loss of its only northern route between Chicago and New York via the Michigan Central and other lines. In 1875 the Michigan Central refused to renew its contract with Pullman Company, whereupon a northern route between Chicago and New York was established by Pullman Company over the Erie and other connecting railroads.

In 1884 Pullman Company sold to the Erie Railroad Company, at the request of the railroad company, enough stock in the sleeping coach company to give it a half interest therein, and entered into an agreement with it to operate the cars of the sleeping coach company. A dispute arose as to the amounts due the Pullman Company under the operating agreement, and in 1888 an agreement was reached with the railroad company whereby Pullman Company acquired all of the stock and assets of the sleeping coach company.

14. The Pullman Company obtained control of Pullman Southern Car Company on October 10, 1872, the date its operations began. This com-

pany was a consolidation of the Pullman, Kimball & Ramsey Sleeping Car Company and the so-called Paine Lines. This consolidation enabled Pullman Company to extend its service into a territory not previously served by it.

15. Detroit & Milwaukee Sleeping Car Company was a trade name for a joint enterprise between George M. Pullman and others. In carrying out this enterprise George M. Pullman operated sleeping cars on the Detroit & Milwaukee Railroad under a contract dated October 14, 1867, between himself and the railroad company which provided that cars of the Pioneer type should be used. The interests of all the parties were acquired by the Pullman Company as of January 31, 1873.

16. During the period between 1867 and 1875 Pullman Company also entered into operating agreements with several railroads which had not previously been served by any sleeping car company.

17. The growth of the sleeping car business of the Pullman Company between 1875 and 1899 was rapid. This was the period of greatest expansion of the railroads in the United States, and most of the new business of the Pullman Company resulted from contracts with railroads which previously had had no sleeping car service, or on which the railroads themselves rendered that service.

18. In 1880 the Pullman Company acquired the sleeping car facilities of the Baltimore & Ohio Railroad Company, and in 1890 the interest of the Atchison, Topeka & Santa Fe Railway Company in a sleeping car association which it had with the railroad. Pullman Company paid the Santa Fe $674,787.81 and relieved it of liability, estimated at $80,000, to make future repairs due under a former contract. The consideration to the Baltimore & Ohio was $1,420,213.42, of which $1,200,000 represented the value of cars and $200,213.42, miscellaneous items set up on the books as part of the transaction.

19. In January, 1889, Pullman Company acquired control of Mann's Boudoir Car Company, Woodruff Sleeping and Parlor Coach Company and Union Palace Car Company by purchase of the outstanding securities of these companies. The Mann and Woodruff companies were small sleeping car companies. They were in financial straits. Union Palace Car Company was incorporated on September 24, 1888, pursuant to a plan whereby it was to secure control of the Mann and Woodruff companies through an exchange of common stock. The principal promoters of the Union Company controlled the Richmond & Danville Railroad Company and caused that company to enter into an operating agreement with the Union Company Before the Union Company, however, was required to begin operation under

the terms of its contract with the Richmond & Danville Railroad, Pullman Company purchased substantially all the securities of the three companies from the promoters. At the same time the Richmond & Danville Railroad agreed to enter into another agreement with the Union Company embodying the terms of the previous agreement with Pullman Company upon condition that the latter guarantee performance of the contract.

20. In 1890 the Pullman Company secured a new contract with the Cincinnati, Hamilton & Dayton Railroad Company, and waived a disputed claim which it had against that company arising out of a former contract. In the same year Pullman Company entered into a new agreement for the operation of sleeping cars on the Louisville, New Albany & Chicago Railroad Company.

21. Between 1867 and 1900 the Pullman Company acquired every sleeping car company in the United States which had not theretofore gone out of business or which had not been acquired by companies subsequently acquired by the Pullman Company or by the Wagner Palace Car Company.

22. In 1899 sleeping car patrons were, as now, passengers of the railroad upon which the service was rendered. Under the then existing contracts with the railroads the amount of sleeping car service furnished and the other elements which determined the movement of passengers in sleep-

ing cars were under the sole control of the railroads.

23. In 1899 the Pullman Company and the Wagner Palace Car Company were the only sleeping car companies in the United States. The Wagner Company operated in territory in which the Pullman Company also operated and Wagner and Pullman were in competition in the business of furnishing and operating sleeping cars for the railroads.

The business of the Wagner Palace Car Company, controlled by the Vanderbilt interests, was suffering from a lack of efficient executive officers. Its earnings had been declining for a number of years. Its owners desired to sell the property and negotiations were opened with the Pullman Company.

The proposed acquisition of the Wagner Company by Pullman Company was given wide publicity. Efforts by stockholders of each company to secure temporary injunctions to prevent the consummation of the transaction were made but failed. In each instance in the court proceeding, a final decree was entered in favor of the defendant company.

The Pullman Company acquired the Wagner Palace Car Company on December 31, 1899. New stock was issued by the Pullman Company and exchanged share for share for the Wagner stock. Subsequent earnings of the Pullman Company

from the operation of the Wagner properties under the same contracts and rates to the public show that Pullman Company made a profitable investment.

24. Whenever the Pullman Company acquired a sleeping car company, it secured operating contracts giving it the right to furnish and operate sleeping cars for the railroads with which such company had theretofore had operating contracts.

25. The Pullman Company did not at any time engage in predatory practices, nor take any action to oppress or impede the business of any other sleeping car company.

26. In the acquisition of other sleeping car properties, the Pullman Company in some cases paid prices in excess of the value of the physical assets so acquired.

27. The acquisition by the Pullman Company of other sleeping car companies was in performance of a plan to eliminate competition or the threat of competition in the furnishing and operating of sleeping cars.

28. Subsequent to December 31, 1899, Pullman Company acquired the interests of various railroad companies in sleeping car associations. This did not extend the scope of the operations of the Pullman Company since it had previously rendered sleeping car service for the associations, in each of which it had an interest.

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29. Between 1900 and 1922 all joint railroad-Pullman sleeping car operations were terminated by the Pullman Company acquiring the interest of the railroad in such operation.

30. After the acquisition of the Wagner Company most of the railroad companies of the United States that were still operating their own sleeping car service subsequently established Pullman service on their lines.

31. Between 1900 and 1935 the Pullman Company acquired substantially all of the sleeping car facilities of every railroad which during that period had owned and operated its own sleeping cars.

32. Whenever the Pullman Company, during the period from 1900 to 1935, secured the facilities of any railroad's sleeping car business, it either already had or it secured contracts to furnish sleeping cars and supply sleeping car service to the railroad whose sleeping car facilities it acquired.

33. The expansion of the operating business of the Pullman Company was due in part to the excellence of its cars and of the other elements of service which it rendered. Its cars were improved from time to time. It received much publicity and established and maintained a reputation for rendering good service. Many railroads sought operating contracts with it.

34. In 1881 Pullman Company built a large manufacturing plant at Pullman, Illinois, for the

purpose of providing necessary facilities for the economical manufacture and repair of its own equipment, and for the establishment of the business of manufacturing and selling railroad rolling stock commercially.

35. The Pullman plant at Pullman, Illinois, is the only plant for the construction of railroad rolling stock that has ever been built by defendants during the 76 years that the Pullman Company has been in existence. All other expansion of railroad car building facilities by the corporate defendants has been accomplished by the acquisition of existing plants at a time when they were being operated by persons other than the corporate defendants.

36. In 1870 Pullman Company purchased the shops of the Detroit Car & Manufacturing Company at Detroit and used them to the extent of their capacity for the manufacture of cars used in its own business and for affiliated companies and associations in which it had a substantial interest. Subsequent to 1881 these shops were used largely for repairing Pullman cars.

37. The shops of the Bowers Dure Car Manufacturing Company at Wilmington, Delaware, were acquired by Pullman Company in 1886 and thereafter used by it for the purpose of repairing its own cars.

38. The Pullman Company acquired the sleeping car manufacturing and repair facilities owned by sleeping car companies acquired by it.

39. When the Pullman Company purchased the properties of the Wagner Company it acquired the shops of that company at Buffalo. These shops had been used, with few exceptions, solely for the manufacture of cars for the Wagner Company. They were used by the Pullman Company for repairing its own cars.

40. Because of inability to compete successfully with other manufacturers of freight cars, the Pullman Company in 1921 acquired the railroad rolling stock manufacturing plant of its competitor, Haskell & Barker Car Company, Inc., which was located at Michigan City, Indiana, and the services of its able and aggressive management. The manufacturing plant of Haskell & Barker had substantially the same facilities for the manufacture of freight cars as the manufacturing plant of the Pullman Company.

41. In 1928 the Pullman Car & Manufacturing Corporation acquired the freight car manufacturing business of the Tennessee Coal, Iron & Railroad Company, which was located at Birmingham, Alabama.

42. Since 1929 the Pullman Company has owned 40,000 shares of the common stock of the General Steel Castings Corporation.

43. In 1930 Pullman Incorporated acquired the passenger and freight car manufacturing facilities of its competitors, the Standard Steel Car

Company and the Osgood-Bradley Car Company and their subsidiaries. The former had extensive freight car manufacturing facilities in the east and facilities for the manufacture of both freight and passenger cars at Hammond, Indiana. Osgood-Bradley had a plant for the manufacture of freight cars at Sagamore, Massachusetts, and another plant at Worcester, Massachusetts, for the manufacture of street cars, trolley buses and similar equipment. The reason that these facilities were acquired was to equalize the competitive disadvantage of Pullman in the sale of freight equipment in the important eastern and New England territories, and to enable it to sell local transportation equipment in New England. Prior to the acquisition of the Standard Steel Car Company, the latter was the second largest freight car manufacturer and Pullman Car and Manufacturing Corporation the fourth largest freight car manufacturer in the United States, but since that acquisition Pullman Car and Manufacturing Corporation, and subsequently Standard, have been the largest freight car manufacturers in the United States. Prior to the time of acquisition of the Standard Steel group, Pullman Car and Manufacturing Corporation was the largest manufacturer of passenger cars in the United States and Standard and American Car & Foundry were the two next largest. Since that time, the Pull-

man Car and Manufacturing Corporation, and subsequently Standard, have been the largest manufacturers of passenger cars in the United States.

44. In 1927 Standard purchased the Dickson Car Wheel Company of Houston, Texas, and in 1931 the Houston Car Wheel & Machine Company.

45. Haskell & Barker Car Company, Inc., was engaged solely in the manufacture of freight cars. The Dickson Car Wheel Company, the Houston Car Wheel and Machine Company and the New Orleans Car Wheel Company, a subsidiary formed by defendants in 1927, manufactured only car wheels. The General Steel Castings Company manufactured no products manufactured at any of the plants of defendants.

46. For a considerable time the manufacturing and operating activities of the Pullman Company were commingled. In 1906 the company completely separated its manufacturing business from its operating business by establishing a manufacturing department within the Pullman Company, which department had its own plant facilities and personnel.

47. A few years prior to 1924 railroads having interlocking directorships with Pullman questioned, under Section 10 of the Clayton Act, the validity of their purchases of equipment from Pullman through non-competitive bidding. In an attempt to retain these interlocking directorates

and at the same time avoid the effect of the Clayton Act and perhaps for other reasons, the Pullman Company in 1924 organized a wholly owned subsidiary, Pullman Car and Manufacturing Company, and conveyed to it all of Pullman's manufacturing assets.

48. In 1927 Pullman Company created Pullman Incorporated, which became the company holding all of the stock of Pullman-Standard Car Manufacturing Company and all except a small fraction of the stock of Pullman Company. Pullman Incorporated and Pullman Company have directors in common.

49. In 1924 the Illinois Commerce Commission authorized Pullman Company to transfer its manufacturing assets to Pullman Car & Manufacturing Corporation (now Pullman-Standard Car Manufacturing Company), on condition and in consideration of the execution by Pullman Car & Manufacturing Corporation of an agreement that it would furnish to Pullman Company all cars, car parts and repairs to cars, which the latter might order, at a price not to exceed the cost of material, labor and actual overhead, plus 10% thereof. Such an agreement was made by Pulman Car & Manufacturing Corporation, and subsequently Standard, and with a certain modification as to the maximum amount of overhead to be charged, is still in effect. Pullman Company is not required by that agreement or by any

other express agreement to order any cars, equipment or supplies from the manufacturing company.

50. The written contract between Pullman and Standard, referred to in Finding 49, is merely ancillary to a course of business whereby Pullman purchased sleeping cars only from Pullman and Standard.

51. It has been the practice of the Pullman Company since the inception of its business to manufacture all of the new cars used by it to the extent that it has had available facilities. In the early days of the company its business increased so rapidly that its manufacturing facilities were inadequate to supply all of its requirements and it was necessary to have some of its cars built by other car builders and in railroad shops. In all such instances a representative of the Pullman Company supervised the construction of Pullman cars.

52. The Pullman Company has since 1881 made itself or purchased from Standard all new sleeping cars which have been used by it in furnishing Pullman service, with a few exceptions mentioned hereinafter in Finding 54.

53. The Pullman Company has not since 1881 sought to purchase any new sleeping cars from any person except Pullman-Standard or its predecessors.

54. Since 1920 the Pullman Company has been the only purchaser of new sleeping cars in the

United States, except that the Atchison, Topeka & Santa Fe purchased five cars, the Chicago, Burlington & Quincy Railroad Company purchased 10 cars and the Denver & Rio Grande Western Railroad purchased four cars, two of which were sleepers, from the Edward G. Budd Manufacturing Company during that period, and exclusive of four combination cars purchased by the Gulf, Mobile and Northern from American Car & Foundry Company.

55. All sleeping cars ordered from United States car builders for domestic use, have been ordered, since 1920, from Standard and Pullman, except for 17 cars from the Edward G. Budd Manufacturing Company, and exclusive of four combination cars from the American Car & Foundry Company.

56. A sleeping car is a type of passenger car and any company equipped to manufacture passenger cars could manufacture sleeping cars. There are no basic patents covering the construction of sleeping cars nor is there any legal restriction upon the right of any company to manufacture them.

57. The American Car & Foundry Company, The Pressed Steel Car Company, Edward G. Budd Manufacturing Company, St. Louis Car Company and the Bethlehem Steel Company are all equipped to and are ready and willing to manufacture sleeping cars, except for conditions arising during the present war emergency.

58. Every new sleeping car built in the United States since February 2, 1931, has been of lightweight construction.

59. The preponderance of all new railway passenger rolling stock, including passenger coaches, parlor cars, dining cars, and miscellaneous cars, built in the United States since 1933, has been of lightweight construction.

60. Standard has built more than 70% of all railroad lightweight passenger rolling stock, including passenger coaches, sleeping cars, parlor cars, dining cars and miscellaneous cars built by car builders.

61. To provide an all new lightweight sleeping car fleet for any railroad would require a very large amount of capital.

62. By virtue of the profits secured by Standard on its noncompetitive sales to Pullman, Standard is the recipient of continuous profitable business from the Pullman Company.

63. The corporate defendants have interlocking directors with the following companies, inter alia: New York Central Railroad, Pennsylvania Railroad, J. P. Morgan & Company, First National Bank of New York, Mellon National Bank, United States Steel Company, Aluminum Co. of America, General Motors Company, U. S. Gypsum Company, E. I. du Pont de Nemours Co.

64. Defendants have at no time taken any steps directed toward the elimination of these interlocking directorates.

65. The Pullman Company furnishes sleeping cars and sleeping car service. Its cars are hauled by the railroads, and its patrons are the passengers of the railroads on whose lines its cars are operated. Sleeping car service is a service that the railroads must render or have rendered by others in connection with their passenger transportation service.

66. The Pullman Company has always held itself out as a company furnishing complete sleeping car service, which consists of furnishing the necessary facilities, supplies and equipment, as well as supervision and the personal service of attendants. It has never held itself out to perform service in sleeping cars owned by others.

67. The Pullman Company is now and since 1900 has been the only person in the United States engaged in the business of supplying sleeping car service to the railroads.

68. The Pullman Company owns and operates nearly all the sleeping cars moving over the railroads of the United States.

69. Prior to the acquisition of the Wagner Company in 1899 the Pullman Company frequently granted contracts for partial or local service only.

70. In the past many railroads have operated their own sleeping car service and at the present time such operations are being carried on to some extent.

71. Since 1899 the Pullman Company has insisted upon inserting an exclusive-right clause in every principal operating agreement with the railroads. A standard provision appearing in most of the contracts offered in evidence, is that Pullman Company shall have the exclusive right to furnish all the sleeping cars to the railroads. In some contracts, particularly the recent ones, Pullman is expressly given the exclusive right to furnish "the usual service" in such cars. However, the Pullman Company has that right under all these contracts.

72. The exclusive contract policy tends to prevent any railroad's attempting the operation of its own sleeping car service.

73. The Pullman Company has since 1899 entered into some agreements with some railroads for carrying on its operations over only a portion of the railroad lines. The agreements of this nature in the record contain no provision giving the Pullman Company the exclusive right to perform all the sleeping car service on these railroads.

74. The contracts under which the Pullman Company offers sleeping car service to the railroads provide that the Pullman Company shall supply sleeping car service only in cars furnished by it, exceptions being made in the cases of the Atchison, Topeka & Santa Fe, The Chicago, Burlington & Quincy and the Denver & Rio Grande Western.

75. Because the number of sleeping cars used by a railroad varies from time to time during the year in response to seasonal and other fluctuations in the volume of passengers using sleeping car accommondations, each railroad must, as a practical matter, have access to a pool of sleeping cars.

76. A pool of sleeping cars is desirable in the public interest.

77. Continuous through-line facilities are essential to the operation of sleeping car service.

78. Railroads operate their own coach trains, not only locally, but in joint through service. There is a fluctuation in coach traffic similar to that in sleeping car traffic.

79. The contracts of the Pullman Company with railroads imposed no obligation upon the former to cooperate in establishing continuous through service with adjoining non-Pullman roads. D. A. Crawford, the president of the Pullman Company, announced from the witness stand, at the trial of the case, that Pullman would be willing to write this into its contracts so that it would be an obligation of the Pullman Company.

80. Prior to 1890, the terms of most of the Pullman contracts were shorter than those which the company subsequently negotiated.

81. Between 1890 and 1920 the term of most of the contracts entered into between Pullman Company and the railroads was from 15 to 25

years. Between 1920 and 1932 the term of most such contracts was 15 years. Since 1932 the term of most Pullman contracts covering furnishing of sleeping cars has been five years. The Pullman Company shortened the terms of the operating contracts with the railroads to avoid being obligated under a long term contract in the face of rising costs and decreasing business.

82. The Pullman Company's price structure has been devised to insure recoupment of defendants' operating expenses, including depreciation, plus an initial return in addition to a share in any excess profits.

83. In order to determine the average expenses per car under its contracts with the railroads, the Pullman Company divided its total expenses, including depreciation on all sleeping cars whether in use or not, by the number of cars actually in operation.

84. In the contract settlements of the Pullman Company with the railroads, it has charged to operating expenses rates of depreciation on its sleeping car properties greatly in excess of the rates justified by the actual service life expectancy of the equipment.

85. The present average depreciated value of a standard heavy-weight car in the pool of the Pullman Company is less than nine percent of the amount which a railroad would have to pay for a new sleeping car. The Pullman Company

is generally under no obligation to sell these heavy-weight cars in its pool to any railroad desiring to operate its own sleeping car service. The Pullman Company has not been willing to sell used sleeping cars except at the price of reproduction cost new less depreciation. Pullman is obligated to sell only light-weight cars at their depreciated sound value.

D. A. Crawford, the president of the Pullman Company, announced from the witness stand, at the trial of the case, that regardless of the terms of its present contract, any railroad could, upon termination of contractual relations with Pullman, purchase standard type sleeping cars assigned to its lines at their sound value, that being cost of reproduction new less depreciation.

86. In contract settlements with the railroads, the Pullman Company has charged to operating expenses, as repairs, excessive expenditures which effected significant extensions in the service life of the equipment.

87. Since 1900 defendants have possessed the power in negotiating new contracts to fix the price for furnishing sleeping cars and sleeping car service in the United States.

88. The Pullman Company has insisted upon and the railroads have executed contracts to supply air-conditioning equipment to the railroads upon terms which contemplated, in substance, that the railroads would bear 75 percent of the cost

of installation, that the Pullman Company would advance the railroads' proportion of that cost, and that the railroads would repay the Pullman Company for the money so advanced over a period of years with interest on the unpaid balances. The railroads, at their option, to be exercised at the beginning of any year, could repay their proportion of the cost of installation (together with interest thereon, and the proportion of the cost of maintenance of the air conditioning equipment) either at an estimated rate per day during the period of the contract or contracts, or they could make such payments on an actual cost basis.

89. The Pullman Company has opposed the supplying of light-weight streamlined cars, in part, at least, to prevent the replacement or the obsolescence of its old heavy-weight cars.

90. The Pullman Company refused to supply any light-weight streamlined equipment unless it was assured either by past experience or by contract guarantee that it would recoup the cost of the light-weight equipment and realize a profit.

91. The Pullman Company refused to supply high-speed betterments to the railroads unless it was assured either by past experience or by contract guarantee that the cost of such betterments would be amortized over a specified period of time, usually five years, and that interest would be paid on the unamortized balance.

92. The terms and conditions under which the Pullman Company has furnished light-weight cars

and cars equipped with air conditioning and high-speed betterments in rendering sleeping car service on various railroads have been arrived at as a result of bargaining between the Pullman Company and the railroads involved.

93. In some instances the Pullman Company has used the request of a railroad company for improved or new equipment as means for negotiating a new principal operating agreement and/or supplemental agreements covering the improved or new equipment.

94. Subject to the approval of the Interstate Commerce Commission the railroads can decrease the business and profits of the Pullman Company by the differentials which they maintain between coach and Pullman car passenger fares. This they have done, in some instances.

95. Since 1906 the passenger rates of the Pullman Company have been subject to the jurisdiction of the Interstate Commerce Commission. All recent increases in the rates of the Pullman Company have been allowed by the Commission.

96. With minor exceptions the country-wide network of sleeping car service is supplied by Pullman Company cars and service.

97. The Pullman Company controls the furnishing and servicing of sleeping cars in the United States.

98. The Pullman Company controls the manufacture of sleeping cars in the United States by

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controlling the domestic market for sleeping cars.

99. The railroads have a financial stake in the Pullman system.

100. The Pullman Company, by virtue of its control over the sleeping car business, is in a position to dictate terms to the railroads requiring its service. This it has done.

101. In view of the Pullman Company's control of the sleeping car industry, it is economically impracticable for all but a very few of the strongest railroads to enter into and conduct their own sleeping car business.

102. All of the facts recited in the stipulation of facts heretofore agreed to between the parties, except as they appear to be otherwise from contracts of record, are found to be facts herein.

CONCLUSIONS OF LAW

1. This Court has jurisdiction of the parties and the subject matter of the suit.

2. The defendants have violated § 1 of the Sherman Act, 26 Stat. 209, as amended, 50 Stat. 693; 15 U. S. C. § 1.

3. The defendants have violated § 2 of the Sherman Act, 26 Stat. 209; 15 U. S. C. § 2.

4. The plaintiff is entitled to relief in accordance with a decree, the details of which will be determined by the Court after further hearing.

By THE COURT,
GOODRICH, J.

In the District Court of the United States for the Eastern District of Pennsylvania

Civil Action No. 994. June Term, 1940

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, ET AL., DEFENDANTS

Before BIGGS, MARIS, AND GOODRICH, Circuit Judges

SUPPLEMENTARY OPINION SUR FORM OF JUDGMENT

(Filed January 22, 1944)

By MARIS and GOODRICH, *Circuit Judges.*—At the request of the Court, the government and the defendants have each submitted a form of proposed judgment. Objections of each to the form submitted by the other have also been proffered, together with briefs setting forth the respective points of view. These have been fully considered.

The determination of the terms of the judgment which will accomplish that which is necessary in the public interest and which will not deal unfairly with the defendants has been a matter of

some difficulty. The major subject of dispute between the parties and the point which has most troubled the Court is the extent to which the present tri-party relation among Pullman Company, Pullman, Inc. and Pullman Standard shall be affected. The government argues that Pullman, Inc. should be directed to dispose of all interest in Pullman Standard; in other words, present owners of the combined Pullman enterprises are to dispose of the manufacturing business and to stay in the sleeping car business. Defendants argue, in turn, that freedom of the market will be accomplished by provisions much milder than this. Their point is that elimination of the exclusive dealing features as between Pullman and the railroads and the establishment of an open market in the purchase of sleeping cars, by terms of the judgment, will accomplish all that the findings and the opinion of this Court require.

Our conclusion is that the public interest requires the complete separation in ownership and direction of the business of manufacturing and the business of operating sleeping cars. We think the public will not get the competitive conditions to which it is entitled if the Pullman Company and the manufacturing organization from whom it has bought all its cars for many years (with slight exceptions immaterial here) remain locked in common ownership and direction. In so concluding we do not for a moment attribute

to the parties before us lack of good faith in the acceptance of the Court's judgment. We do think, however, that if we had adopted the defendants' suggestion we would have left in existence a condition which has been the source of much of the trouble and invite the probability of its repetition. There must, therefore, be what counsel for the defendants aptly characterizes as a divorcement.

We are equally clear, however, that the public interest does not require that the Court make the choice for Pullman, Inc. as to which one of its present two businesses it shall continue to own and operate. Separation is not an end in itself; it is a means to provide an open market. Counsel for the government have not given us, in their able brief, convincing arguments why the public interest requires a disposition of the manufacturing business instead of the service business. They have stressed with some force that the retention of the service business would be better for the interests of the shareholders of Pullman, Inc. With regard to that point, the Court thinks that the problem what is for the best interests of the owners can well be settled by the owners themselves, whose money is invested in the enterprise. The object to be accomplished by the Court's judgment is remedial not punitive. Separation is a necessary element in the remedy. But there is no reason, in protection of the public interest, why the separation needs to be made more difficult

than necessary for the defendants nor against their judgment of what is in their best interests.

The defendants should have a reasonable time, say three months, to explore the possibilities and provide a plan for the separation. They should have an additional period, perhaps a year, to effect it. If they cannot accomplish it by that time, the Court will have to order it done by such means as its ingenuity may devise. But defendants should have opportunity to try it themselves first.

With regard to the other points in the judgment, there is only one matter which we think requires comment. Since a separation is to be effected and since the Pullman Company and Pullman Standard will not only be separate entities in law but owned separately in fact, we see no reason why Pullman's future purchases of cars need be subjected to rules of competitive bidding.

The other provisions of the judgment may, we think, be worked out between the parties. The draft submitted by the government may be taken, except for the points above discussed, as a basis. If the parties are unable in the light of this opinion to agree upon the form of the judgment the Court will, upon being advised of their inability, settle the form.

Judge Biggs dissents in part from the views expressed in this opinion and will file an opinion setting forth his views.

In the District Court of the United States
for the Eastern District of Pennsylvania

Civil Action No. 994

UNITED STATES OF AMERICA

v.

THE PULLMAN COMPANY, ET AL

BIGGS, Circuit Judge (dissenting in part). (February 2, 1944.) While I concur in part in the views expressed in the majority opinion I dissent because I think that the decree to be entered by the court will not effect a realistic solution of the problem which confronts us. We have concluded that the monopoly cannot be ended solely by injunction and it is necessary to compel the divorcement by Pullman, Inc. of certain of its subsidiary companies. The majority of the court invite Pullman, Inc. to decide whether it shall divest itself of the service company, Pullman Company, or shall divest itself of the manufacturing units typified by Pullman-Standard Manufacturing Company. In my opinon we should decide what company or companies should be divested. Our decision should compel Pullman, Inc. to sell its interest in Pullman-Standard and should cause Pullman Company to make use

of a competitive bidding system for the acquisition of new cars.

I have little doubt that in exercising the choice that the majority confers upon it Pullman, Inc. will try to dispose of its stock in Pullman Company and will endeavor to retain the stock of Pullman-Standard and the other manufacturing units. This should prove to be the case for at least two reasons. First; it is probable that more money will be made in manufacturing new sleeping cars than in servicing sleeping cars. Cars now in the Pullman pool will be largely obsolete by the war's end. New cars of modern lightweight construction must then be supplied to or purchased by the railroads. The market for new sleeping cars will be large and vigorous. Second; only about 15% of the business of Pullman-Standard was devoted to making new sleeping cars prior to December 7, 1941. Pullman-Standard, therefore, will be but little affected by the decree.

In my opinion the sale of Pullman Company and the retention of the manufacturing units by Pullman, Inc. will be contrary to the public interest for the following reasons.

First; the manufacturing properties and their superior directing personnel are on one side and Pullman, Inc., Pullman Company and their superior directing personnel are on the other. About two-thirds of the military passenger traffic in the

United States is presently carried in Pullman sleeping cars and civilian passenger sleeping car traffic has been augmented enormously by war factors. Nearly half of the 7,000 sleeping cars in the Pullman pool are now engaged in moving troops.[1] Whoever may be the purchaser of the stock of Pullman Company, new management for it becomes inevitable. This may result in the dislocation of a service the maintenance of which at this time and under present circumstances has taxed the skill and ingenuity of even the present highly trained directing personnel of Pullman Company.

Second; the probable effect of the court's decree will be to compel the railroads of the United States, which must maintain adequate through sleeping car service, to purchase the stock of Pullman Company. The railroads are keenly competitive. Their need for sleeping cars varies widely. To what extent is each to contribute to the maintenance of the Pullman pool which we are unanimous in believing must be maintained? Who will police the operations of the pool in order to make sure that those carriers who contribute to the purchase of Pullman Company stock (contributions which must vary in amount in accordance with needs and resources) will

[1] See the pamphlet "Performing in War and Preparing for Peace" by George A. Kelly, Vice-President of the Pullman Company, published October 7, 1943.

treat their partners in the joint enterprise or the public without discrimination? I know of no power presently vested in the Interstate Commerce Commission or in any other government agency which would enable it to regulate such a pool operation.[2]

Third; the element of time is important in the present case. The monopoly must be broken soon enough to permit an active and untrammelled market for new light-weight sleeping cars at the close of the war. The operations of Pullman Company are highly specialized. It will be difficult to find a purchaser for Pullman stock unless it be the railroads or interests representing them. In any event there must be delays in effecting the sale. Pullman Company stock will be found to be not readily salable whoever the purchaser may be. The decree of this court, therefore, will delay the end of the monopoly instead of promptly obliterating it as the public interest requires. Indeed, if the war should end before

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[2] In making this statement I am not unmindful of the "car-service" provisions of the Interstate Commerce Act. See Section 1, subsections (10), (11), (13)–(16), 49 U. S. C. A. § 1 (10), (11), (13)–(16). These sections do not contemplate the operation or policing of a pool of the kind which Pullman Company has maintained.

It should also be noted that Congress has found it necessary as a matter of public policy to prevent the pooling or division of traffic or of service or of gross or net earnings by the common carriers by railroad, except upon specific approval by order of the Interstate Commerce Commission, 49 U. S. C. A Sec. 5 (1).

the Pullman Company stock is sold, I can scarcely believe that any purchaser will be found for it. Neither the railroads nor any other person could be expended money to buy obsolete equipment. The desirable pool operation as now constituted would fall. Our decree would be a futility.

Fourth; it is a striking anomaly that the tort-feaser, Pullman-Standard, should be left in a position where it can profit greatly by way of the monopoly from the sale of light-weight sleeping cars in the post-war market. Pullman-Standard through Pullman, Inc. will be left in possession of those railroad contacts which have brought it valuable contracts in the past. If the railroads purchase the Pullman Company stock, railroad representatives must sit on the board of directors of Pullman Company and, absent any injunctive requirement that Pullman Company must buy new cars under a competitive bidding system, Pullman Company will purchase new sleeping cars as in the past from Pullman-Standard. Under these circumstances I conceive that the engrossment of the market by Pullman-Standard will continue and that it will be a bold competitor who will hazard capital in the manufacture of sleeping cars. There is a momentum in the existing monopoly which it is unrealistic not to recognize.

If, upon the other hand, this court were to compel Pullman, Inc. to divest itself of the stock of Pullman-Standard and were to couple with this

the requirement that Pullman Company should purchase new cars by a competitive-bidding system, the market would be cleansed of the monopoly promptly. The stock of Pullman-Standard is readily salable. Its superior directing personnel might remain as now constituted since, as I have indicated, there is a cleavage between the personnel of Pullman-Standard on the one hand and that of Pullman, Inc. and Pullman Company on the other. The nexus between the manufacturing units and the railroads would be broken. The monopoly thus obliterated could not recur.

For all of these reasons if I were free to do so I would put into effect the substance of the decree proposed by the United States. The decree which will be entered under the majority opinion to my mind will not effect the end required by the anti-trust laws of the United States.

District Court of the United States for the Eastern District of Pennsylvania

Civil Action No. 994. June Term, 1940.

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN INCORPORATED, PULLMAN CAR & MANUFACTURING CORPORATION OF ALABAMA, DAVID A. CRAWFORD, GEORGE A. KELLY, LOWELL M. GREENLAW, CHARLES A. LIDDLE, ELLIS W. TEST, WILLIAM J. PETERS, E. EUGENE ADAMS, SEWELL L. AVERY, JAMES F. BELL, ARTHUR O. CHOATE, J. FRANK DRAKE, DONALD R. MCLENNAN, RICHARD K. MELLON, J. PIERPONT MORGAN, JOHN R. MORRON, ALAN M. SCAIFE, ALFRED P. SLOANE, JR., HENRY S. STURGIS, HAROLD S. VANDERBILT, GEORGE WHITNEY, LOUIS S. TAYLOR, W. N. BARKER, H. H. GILBERT, J. A. KNOWLTON, H. M. DUDLEY, WM. BIERMAN, R. L. GORDON, P. G. JENKS, R. S. EULER, H. S. MORGAN, AND C. W. SEABURY, DEFENDANTS

Present: BIGGS, MARIS, AND GOODRICH, Circuit Judges

FINAL JUDGMENT

(Entered May 8, 1944)

This cause came on to be heard upon the amended complaint and the amended answer there-

to, and upon proofs duly taken, and was fully argued by counsel. The Court having thereafter rendered and filed its opinion and having made and entered findings of fact and conclusions of law,

Now, upon motion of plaintiff, by Wendell Berge, Assistant Attorney General, Frank Coleman, Special Assistant to the Attorney General, and Paul Fitting, Special Attorney, for relief in accordance with the prayer of the amended complaint; and the defendants having severally appeared by counsel, it is ordered, adjudged and decreed as follows:

A. GENERAL PROVISIONS

1. Whenever any one of the following italicized terms or expressions is used in this judgment, it shall be deemed to have the meaning attached to it in this paragraph.

(a) *Furnishing sleeping cars;* the supplying of sleeping cars, but not the service in the cars, nor the transportation of the cars. This shall not include any transactions that are primarily sales of sleeping cars.

(b) *Servicing sleeping cars;* the supplying of service in sleeping cars, but not the supplying of the sleeping cars in which the service is performed, nor the transportation of the cars.

(c) *Sleeping car;* a railroad car in which accommodations for night-time sleeping in a berth

or other horizontal bed are present, as distinguished from cars having only reclining chairs.

(d) *Successors;* corporations which, by a process of merger, consolidation or duly authorized legal succession have become invested with the rights and have assumed the liabilities of a prior corporation, as distinguished from corporations which have acquired title to the assets of the prior corporation by purchase.

(e) *Pullman;* The Pullman Company and its successors.

(f) *Standard;* Pullman-Standard Car Manufacturing Company, Pullman Car & Manufacturing Corporation of Alabama, and such of their subsidiary companies as are engaged in the car manufacturing business, and their successors.

(g) *Sleeping Car Business;* the business presently carried on by The Pullman Company.

(h) *Manufacturing Business*; the business of manufacturing cars presently carried on by Pullman-Standard Car Manufacturing Company, Pullman Car & Manufacturing Corporation of Alabama and their respective subsidiaries.

2. The Court has jurisdiction of the parties to, and the subject matter of, this suit; and the complaint states grounds for relief against the defendants under the Act of Congress of July 2, 1890, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," known as the Sherman

Antitrust Act (26 Stat. 209, as amended, 50 Stat. 693, 15 U. S. C., Secs. 1-7, 15).

3. The defendants The Pullman Company, Pullman-Standard Car Manufacturing Company, Pullman Incorporated, and Pullman Car & Manufacturing Corporation of Alabama (hereinafter collectively referred to as the Corporate Defendants), and the individual defendants, and each of them have contracted, combined, and conspired to restrain trade and commerce in violation of Section 1 of the Sherman Antitrust Act with respect to the furnishing and servicing, and manufacturing and selling, of sleeping cars.

4. The Corporate Defendants, the individual defendants, and each of them, have combined and conspired to monopolize, have attempted to monopolize, and have monopolized, trade and commerce in violation of Section 2 of the Sherman Antitrust Act with respect to the furnishing and servicing, and manufacturing and selling, of sleeping cars.

5. The Corporate Defendants, their respective successors, officers, directors, agents, and employees, and all persons and corporations acting under, through, or for them, and each of them, are enjoined hereby from doing the acts prohibited by this decree, and are directed hereby to do the acts required by this decree.

6. The Corporate Defendants, their successors and their respective officers, directors, agents,

and employees, and each of them, and all persons and corporations acting or claiming to act on behalf of them or any of them, shall not enter into, participate in, or perform, any contracts, agreements, arrangements, or understandings, with each other, with any railroads, or with any manufacturers or owners of railroad rolling stock, or with any of them, for the furnishing, servicing, manufacturing, or selling, of railroad sleeping cars, the individual or collective effect of which will be unreasonably to lessen competition between the Corporate Defendants and their successors, the railroads, and manufacturers or owners of railroad rolling stock, or any of them, or to create a monopoly, in the furnishing, servicing, manufacturing, or selling, of railroad sleeping cars.

B. SEPARATION OF THE BUSINESS OF MANUFACTURING AND THE BUSINESS OF OPERATING SLEEPING CARS

7. It is a purpose of this judgment to separate completely and perpetually the Sleeping Car Business from the Manufacturing Business and to separate completely and perpetually the ownership and control of each Business from the ownership and control of the other, irrespective of who owns or controls such Businesses.

8. No corporation owning or controlling either Business, its officers, directors, agents, or employees, or any of them, or any persons, firms, or

corporations, having notice of this judgment, shall attempt by holdings of stock or other securities, by proxy holdings, by fictitious holdings, assignments, or transfers of stock, or by any other means, to evade, impair, or destroy the effectiveness of the separation specified in paragraph 7.

9. Pullman Incorporated shall within ninety days after the effective date of this judgment file with the Court its election to make such disposition either (a) of all its interest in the Sleeping Car Business and the properties used in connection therewith, or (b) of all of its interest in the Manufacturing Business and the properties used in connection therewith, as will result in a complete separation of such Businesses and the ownership and control thereof. At the same time Pullman Incorporated shall also submit to the Court for hearings and approval a plan to effectuate such separation.

10. The Court hereby reserves jurisdiction to determine to what extent, if any, it will require any persons or corporations that acquire the business or properties to be disposed of hereunder to be bound by the provisions of this judgment or amendments or additions thereto, including among other things, provisions, if any, deemed appropriate to prevent future unification of control by stock ownership.

11. Pullman Incorporated shall, within one year after the approval by the Court of a plan of separation, carry out such plan and shall promptly

thereafter make a report to this Court, in reasonable detail, of the execution of said plan, including in such report a full list of the persons, firms or corporations that shall have acquired its interests in the business, properties, stock, or other securities, of which it has disposed. In the event such plan has not been carried out within one year after its approval the Court will take such steps relative to the disposition of the Business specified in the election made by Pullman Incorporated under paragraph 7 as may be necessary to carry out the provisions of this judgment.

12. The Corporate Defendants, their officers, directors, agents, employees, and each of them, shall not, in carrying out the separation of the Sleeping Car Business from the Manufacturing Business, transfer the properties or issue or transfer any of the capital stock, bonds, or other evidences of indebtedness of the Business disposed of to:

(1) Officers, directors, agents or employees of the Business retained; or

(2) Any one who owns or controls, directly or indirectly or through agents, trustees, representatives or nominees, any of the issued and outstanding capital stock, bonds, or other evidences of indebtedness of the Business retained; provided that this paragraph shall not apply, during the process of separation, to marketing groups, syndicates, and stock market or brokerage firms.

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(3) Any one acting for or on behalf of one falling within the prohibitions of subparagraph (2) above; or

(4) Any one acting alone or in concert, agreement or understanding, with any other persons, firms, or corporations, to establish a community of ownership or control of both Businesses.

13. The Corporate Defendants, their officers, directors, agents, and employees acting in good faith, may rely upon an affidavit that affiant does not fall within any of the prohibited classes set forth in paragraph 12 above.

14. From and after the separation of the Sleeping Car Business from the Manufacturing Business, no corporation owning or controlling either Business, and no principal officer or director of such corporation shall own or control, directly or indirectly, any of the issued and outstanding capital stock, bonds, or other corporate securities of any corporation owning or controlling the other Business. This prohibition shall not be construed to prevent normal credit relationships between the two Businesses, including equipment trusts, conditional sales, and other similar evidences of indebtedness.

15. No corporation owning or controlling either Business shall elect, employ, or retain in office, as an officer, director, agent, or employee, any person who is also an officer, director, agent or employee of any corporation owning or con-

trolling the other Business, except that such corporations shall have the right to employ a common stock transfer agent or registrar.

16. From and after the separation of the Sleeping Car Business from the Manufacturing Business, Pullman shall neither build new sleeping cars, nor engage in the business of manufacturing railroad passenger rolling stock; and Standard shall not engage in the business of furnishing, servicing, or furnishing and servicing, sleeping cars.

17. Pullman and Standard shall not enter into any actual or tacit contract, agreement, or understanding, whereby the exclusive course of dealing under which The Pullman Company bought sleeping cars only from Pullman-Standard Car Manufacturing Company, and Pullman-Standard Car Manufacturing Company manufactured and sold sleeping cars only to The Pullman Company, is continued or revived at any time or in any form between Pullman and Standard.

18. Any orders, contracts, arrangements, or understandings in existence on the effective date of this judgment between Pullman and Standard for the building or furnishing by Standard of sleeping cars to Pullman now or in the future are hereby declared to be and are unlawful, void, and of no effect, except as to cars on which Standard has actually begun construction or has

made commitments for material specifically for use in such building or furnishing.

19. For a period beginning with the effective date of this judgment and running until the separation of the Sleeping Car Business from the Manufacturing Business, Pullman shall acquire new sleeping cars for use in the business of furnishing, or furnishing and servicing, sleeping cars only pursuant to competitive bidding, whether such acquisitions are outright purchases, leases, or in some other form; provided, however, that this section shall not apply in cases of the lease to Pullman of railroad owned cars for use in supplying sleeping car service on such railroad, nor in cases of short-term rental arrangements. Pullman shall invite bids by causing complete information on the numbers and specifications of the equipment desired to come to the attention of all car builders through advertising or other means in sufficient time to permit the adequate preparation of bids. Bid specifications shall give reasonable and appropriate options with reference to structural design and the use of various structural materials, provided they meet the safety standards provided for in "AAR specifications for the construction of new passenger equipment cars" adopted by the Association of American Railroads on March 31, 1939, in any subsequent revisions of those specifications, or in any subsequent safety standards which receive similar general acceptance as

the standard for the industry. Award of the contract to build the cars shall be made to the lowest responsible bidder. Other bidders shall not have the privilege of participating in the contract by the device of equalizing bids or meeting the low bid unless the successful bidder so agrees, except upon a showing that the successful bidder has inadequate plant capacity, or is otherwise unable to build all of the cars within a reasonable time. Pullman shall have the right to reject all bids and request the submission of new ones. A statement showing the total amount of each of the bids, and the number and type of cars involved, shall be available for inspection by all bidders, and by all the railroads with which Pullman has operating contracts.

20. Any orders, contracts, arrangements or understandings, existing on the effective date of this judgment, between Standard and any railroad, whereby Standard is to build for such railroad, now or in the future, passenger rolling stock for use in any train in which Pullman is to operate sleeping cars, shall be subject to cancellation at the option of such railroad within sixty days after the effective date of this judgment, except as to the particular cars on which Standard has actually begun construction or has made expenditures or binding commitments for materials, parts, specialties, jigs, dies, templates, formers, patterns, or tools specifically for use in the construction thereof.

C. RAILROAD PURCHASES OF USED SLEEPING CARS

21. From and after the approval by the Court of a plan for the separation of the Sleeping Car Business from the Manufacturing Business as provided in paragraphs 9 and 11 above, Pullman shall sell to any railroad that has an operating contract with Pullman for the furnishing, or furnishing and servicing, of sleeping cars, and any such railroad shall have the right to purchase from Pullman, used sleeping cars on such terms as shall be set forth in the order of the Court approving the plan of separation. The railroad shall exercise this right to purchase within six months of the expiration or other termination of the contract. Pullman shall not, without the prior consent of this Court, sell any used sleeping car to any purchaser prior to the approval by this Court of the plan of separation provided for in paragraphs 9 and 11 above.

D. SERVING RAILROAD-OWNED CARS

22. Pullman, as long as it continues in the sleeping car business, at the request of any railroad shall offer upon reasonable and non-discriminatory terms to service, and, if a contract providing therefor is made with such railroad, shall service any sleeping car owned by such railroad while it is on the lines of such railroad and on any of the through lines in which such railroad participates, provided that Pullman shall be required to service only railroad owned sleep-

ing cars, the structures of which meet the safety standards provided for in "AAR specifications for the construction of new passenger equipment cars" adopted by the Association of American Railroads on March 31, 1939, in any subsequent revisions of those specifications, or in any subsequent safety standards that receive similar general acceptance as the standard for the industry. For the purposes of this paragraph, any sleeping car of which a railroad has the possession and use for the purpose of offering sleeping accommodations to the public, irrespective of whether the title to such cars is vested in such railroad, or in someone else, shall be considered a railroad owned sleeping car.

E. PARTIAL OPERATION

23. Pullman, as long as it continues in the sleeping car business, shall offer upon reasonable and non-discriminatory terms to service, or furnish and service, and, if a contract providing therefor is made with such railroad, shall service, or furnish and service, sleeping cars on any line of any railroad at the request of such railroad, to the extent that cars are available, even though sleeping cars are about to be or are being furnished, serviced, or furnished and serviced, on other lines of the same railroad by the railroad itself or by some third party.

24. If any railroad shall so request, Pullman, as long as it continues in the sleeping car business,

shall offer upon reasonable and non-discriminatory terms to furnish and service and, if a contract providing therefor is made with such railroad, shall furnish and service cars from the pool of sleeping cars owned and operated by Pullman, to the extent that cars are available, for the purpose of meeting all or a part of the peak or seasonal demands for sleeping car accomodations on the lines of such railroad, irrespective of whether or not such railroad has a contract or agreement with Pullman whereby Pullman is to furnish, service, or furnish and service, sleeping cars to meet all or a part of the normal requirements of such railroad.

F. THROUGH LINE OPERATION

25. If any railroad is or becomes a party to any arrangement for a joint through sleeping car line with any other railroad or railroads, Pullman, as long as it continues in the sleeping car business, shall upon request of such railroad offer and agree upon reasonable and non-discriminatory terms to furnish and service out of its then available equipment such railroad's quota under the through line arrangement of sleeping cars required for such joint through sleeping car line.

G. EXCLUSIVE RIGHT CLAUSE

26. Pullman shall not agree upon, insert in any contract, or enforce any so-called "Exclusive

Right" clause, or any similar provision, which shall give or purport to give to Pullman the exclusive right to furnish, service, or furnish and service, all of the sleeping cars on any railroad, or all of the sleeping car service of any particular type on any railroad, or which shall require that the railroad deal only with Pullman in the matter of furnishing, servicing, or furnishing and servicing, sleeping cars. Any clause in any existing contract between Pullman and any railroad which purports to grant such exclusive or similar right to Pullman is hereby declared to be and is henceforth unlawful, void and of no effect.

H. ACQUISITION OF COMPETITORS

27. Pullman and Standard shall not merge, consolidate, or otherwise combine with, and shall not acquire any ownership or control, direct or indirect or through agents, trustees, representatives, or nominees, in or over the assets, properties, business, capital stock, bonds, or other evidence of indebtedness of, any persons, associations, or corporations engaged in the business of furnishing, servicing, manufacturing, or selling, sleeping cars, except with the approval of this Court, granted after a showing by Pullman or Standard that such acquisition, merger, consolidation, or other combination, does not and is not intended to have the effect of unreasonably restraining trade or of creating a monopoly in the

furnishing, servicing, manufacturing, or selling, of sleeping cars. Due notice of any application for such approval shall be given the Attorney General. This paragraph shall not be construed to forbid the purchase or other acquisition by either Pullman or Standard of goods and materials in the ordinary course of its business, or to prevent the merger, consolidation, or other reorganization of any or all of the companies composing either Pullman or Standard.

28. From and after the separation of the Sleeping Car Business from the Manufacturing Business, Pullman shall not employ, or elect, or permit to continue in office, as an officer or director of Pullman, any person who is also an officer or director of any railroad company that offers sleeping car service to the public on any of its lines.

I. INCONSISTENT CONTRACT PROVISIONS VOID

29. Any contract, agreement, or understanding between Pullman and any railroad that is in force and effect during all or any part of the period of time beginning one year from the effective date of this judgment and ending one year after the formal termination of the present war shall be subject to cancellation by such railroad at any time, provided that such railroad shall give to Pullman six months' notice of such cancellation. Such cancellation shall void the contract obliga-

tion, if any, of such railroad to buy the new-type lightweight cars furnished by Pullman to such railroad at its request upon the cancellation or termination of the contract.

30. To the extent that the provisions of any existing contracts, agreements, arrangements, or understandings, between Pullman and any railroads are inconsistent with any specific provisions of this judgment, such provisions are hereby declared to be and are henceforth unlawful, void and of no effect.

J. MISCELLANEOUS PROVISIONS

31. Nothing in this judgment contained shall be construed as depriving the Interstate Commerce Commission of its jurisdiction over contracts between carriers under Section 5 (1) or other provisions of the Interstate Commerce Act.

32. For the purpose of assisting the Attorney General to secure compliance with this judgment, and for no other purpose, Pullman, Standard, their respective officers, directors, agents and employees and each of them, on written request of the Attorney General, or of the Assistant Attorney General in charge of antitrust matters, reasonably made to the principal office of such corporations, subject to any legally recognized privilege, (1) shall permit duly authorized representatives of the Department of Justice to have access, during the office hours of

such corporations, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of any of the corporations relating to any matters contained in this judgment; (2) shall permit duly authorized representatives of the Department of Justice subject to the reasonable convenience of such corporations, but without restraint or interference, to interview officers, directors, or employees of such corporations, who may have counsel present, regarding any matters contained in this judgment; (3) shall submit such reports in respect of any matters as may from time to time be reasonably necessary for the proper enforcement of this judgment. Information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings for the purpose of securing compliance with this judgment in which the United States is a party, or as is otherwise required by law.

33. Jurisdiction of this cause, and of the parties hereto, is retained by the Court for the purpose of enabling any of the parties to this judgment, or any other person or corporation that may hereafter become bound, in whole or in part, thereby, to apply to the Court at any time for such further

orders, modifications, vacations or directions as may be necessary or appropriate:

(a) For the construction or carrying out of this judgment,

(b) For the enforcement of compliance therewith and the punishment of violations thereof,

(c) For the carrying out of any plan or plans of separation that may be approved by the Court,

(d) For the separation of the Sleeping Car Business from the Manufacturing Business by the disposition of the Business not specified for disposition by Pullman Incorporated in its election made under paragraph 7, in case the Court finds it is impracticable to dispose in the manner provided for in paragraph 11 of the Business specified for disposition in the election,

(e) Whenever by reason of changes of any facts, circumstances, conditions or law, the provisions of this judgment may have become inappropriate, improper, oppressive or no longer necessary to maintain conditions in harmony with the law, and

(f) For any other reason that the Court may deem sufficient.

34. Within thirty days after the effective date of this judgment, defendant The Pullman Company shall send to each railroad over whose lines it furnishes, services, or furnishes and services, sleeping cars, and defendant Pullman-Standard Car Manufacturing Company shall send to every

railroad with which it has any order, contract, arrangement or understanding for the manufacture of passenger rolling stock, a copy of this judgment. Within twenty days of the sending of such copies, such defendants shall file with this Court and with the Assistant Attorney General in charge of the Antitrust Division a list of the railroads to which such copies were sent.

35. This judgment shall take effect at the expiration of sixty days from the date of its entry unless within that time an appeal is taken, in which event it shall take effect on the day on which the mandate of the Supreme Court is filed in this Court.

36. The plaintiff shall recover from the Corporate Defendants herein jointly and severally all the costs of this suit.

By THE COURT:
JOHN BIGGS, JR.,
ALBERT B. MARIS,
HERBERT F. GOODRICH,
Circuit Judges.

District Court of the United States for the Eastern District of Pennsylvania

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Civil Action No. 994. June Term, 1940.

UNITED STATES OF AMERICA, PLAINTIFF,

v.

THE PULLMAN COMPANY, PULLMAN-STANDARD CAR MANUFACTURING COMPANY, PULLMAN INCORPORATED, PULLMAN CAR & MANUFACTURING CORPORATION OF ALABAMA, DAVID A. CRAWFORD, GEORGE A. KELLY, LOWELL M. GREENLAW, CHARLES A. LIDDLE, ELLIS W. TEST, WILLIAM J. PETERS, E. EUGÈNE ADAMS, SEWELL L. AVERY, JAMES F. BELL, ARTHUR O. CHOATE, J. FRANK DRAKE, DONALD R. MCLENNAN, RICHARD K. MELLON, J. PIERPONT MORGAN, JOHN R. MORRON, ALAN M. SCAIFE, ALFRED P. SLOANE, JR., HENRY S. STURGIS, HAROLD S. VANDERBILT, GEORGE WHITNEY, LOUIS S. TAYLOR, W. N. BARKER, H. H. GILBERT, J. A. KNOWLTON, H. M. DUDLEY, WM. BIERMAN, R. L. GORDON, P. G. JENKS, R. S. EULER, H. S. MORGAN, and C. W. SEABURY, defendants.

Before Biggs, Maris, and Goodrich,
Circuit Judges.

Opinion Sur Judgment

(Filed May 8, 1944)

Per Curiam: The court has given full consideration to the relief to be accorded in this case, and the views of its members upon certain of the questions arising in this connection have been expressed heretofore. 53 F. Supp. 908. A majority of the court have reached the conclusion that appropriate relief will be accorded by the provisions of the judgment entered today. In joining in the entry of this judgment, Judge Biggs, none the less, adheres to the views expressed by him in his opinion heretofore filed, dissenting in part, but concludes that the judgment is appropriate to carry out the decision of the court as expressed by the majority.

By The Court,
John Biggs, Jr.,
Albert B. Maris,
Herbert F. Goodrich,
Circuit Judges.

In the District Court of the United States, for the Eastern District of Pennsylvania

Civil Action No. 994. June Term, 1940

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, ET AL., DEFENDANTS

OPINION OF COURT UPON APPLICATION FOR APPROVAL OF SALE OF STOCK OF PULLMAN COMPANY

(Filed December 18, 1945)

Before BIGGS, MARIS, and GOODRICH, Circuit Judges, sitting pursuant to the Expediting Act (Act of Feb. 11, 1903, as Amended, 36 Stat. 854, 1167; 15 U. S. C. § 28)

By GOODRICH, *Circuit Judge.* This case now comes to the Court upon an application for approval of a contract of sale. On March 22, 1945 the Court made an order permitting Pullman, Inc. to cause the Pullman Company to offer to "treat with the railroads or any other persons for the sale of Sleeping Car Business and the properties connected therewith now owned by The Pullman Company." Pullman, Inc. was also authorized to treat for the sale of the stock of the Pullman Company. Pursuant to this authority

Pullman, Inc. on May 12, 1945 made an offer of sale to the railroads. This offer was not, at the time, accepted. During the period between the date of that offer and the present, four propositions have been submitted to Pullman, Inc. for the disposal of the stock of the sleeping car company. The first is from Otis and Co.; the second is from Glore, Forgan and Co.; the third is from the Standard Steel Spring Company and the fourth from a group of railroads. The railroad group subsequently modified their proposition so as to constitute it an unqualified acceptance of Pullman, Inc.'s original offer to sell and the latter now comes to the Court asking for an order approving the sale.

The individual offerors, a number of the railroads, a number of unions representing employees of the Pullman Company and the States of California and Colorado have, with the Court's permission intervened.[1] The testimony presented by the various offerors was heard by the Court on November 5 and 6 and that presentation was followed on December 10, 11 and 12 by argument on the part of counsel for all parties who desired to be heard.

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[1] The list of interveners as of December 10, 1945 was:

Otis & Co., Glore, Forgan & Co.; Standard Steel Spring Company.

The Atchison, Topeka and Santa Fe Railway Company; Atlantic Coast Line Railroad Company; The Baltimore and Ohio Railroad Company; Chicago, Burlington & Quincy Railroad Company; Henry A. Scandrett, Walter J. Cum-

Because the considerations presented to the Court in argument upon the question of approval of Pullman's sale of its sleeping car business to the railroads have covered a wide field, it seems well to reorient ourselves to the questions now before us in this case.

The original proceeding was a suit in equity brought by the United States against Pullman,

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mings, and George I. Haight, as Trustees of Chicago, Milwaukee, St. Paul and Pacific Railroad Company; Chicago and North Western Railway Company; Joseph B. Fleming and Aaron Colnon, as Trustees of The Chicago, Rock Island and Pacific Railway Company; Great Northern Railway Company; Illinois Central Railroad Company; Louisville and Nashville Railroad Company; The New York Central Railroad Company; Howard S. Palmer, James Lee Loomis, and Henry B. Sawyer, as Trustees of The New York, New Haven and Hartford Railroad Company; Norfolk and Western Railway Company; Northern Pacific Railroad Company; The Pennsylvania Railroad Company; Southern Pacific Company; Southern Railway Company; Union Pacific Railroad Company; Wabash Railroad Company; and L. R. Powell, Jr., and Henry W. Anderson, as Receivers of Seaboard Air Line Railway Company; Alabama Great Southern Railroad Company; Atlanta and West Point Railroad Company; Bangor and Aroostook Railroad Company; Boston and Maine Railroad; M. P. Callaway, Trustee of Central of Georgia Railway Company; Chicago Great Western Railway Company; The Cincinnati, New Orleans and Texas Pacific Railway Company; The Delaware & Hudson Railroad Corporation; Delaware, Lackawanna & Western Railroad Company; Wilson McCarthy and Henry Swan, Trustees of The Denver & Rio Grande Western Railroad Company; Erie Railroad Company; Scott M. Loftin and J. W. Martin, Trustees of Florida East Coast Railway Company; Georgia Southern and Florida Railway Company; The Kansas City Southern Railway Company; Lehigh Valley Railroad Company; Maine

Inc., its associated companies and some individuals connected therewith. It charged Pullman with monopolistic practices which violated the Sherman Act. The Court after a long series of hearings found that the defendants had violated the Sherman Act. Since all aspects of this part of the case were fully discussed in the original opinion that discussion need not be repeated here.

Relief against continuation of the monopolistic practices was discussed in the original opinion. 50 F. Supp. 123. Separation of Pullman Standard, which manufactures sleeping cars and other rolling stock, from the Pullman Company, which owns and operates the sleeping cars, was ordered. 53 F. Supp. 908. This separation was not an end in itself, but merely a means of policing to insure compliance with the decree. We left it to Pullman, Inc. to decide which end of its business it

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Central Railroad Company; The Nashville, Chattanooga and St. Louis Railway Company; New Orleans and Northeastern Railroad Company; The Pittsburgh and Lake Erie Railroad Company; Reading Company; Richmond, Fredericksburg & Potomac Railroad Company; The Western Pacific Railroad Company; and The Western Railway of Alabama; Chesapeake and Ohio Railway Company; The New York, Chicago, and St. Louis Railroad Company; and the Pere Marquette Railway Company.

The Order of Railway Conductors of America; The Pullman Clerks' Association; The Pullman Car Employees Association of the Repair Shops; The Independent Pullman Workers Federation; Pullman Porters Union; Brotherhood of Sleeping Car Porters; United Transport Service Employees of America:

States of California and Colorado.

chose to retain and which to dispose of. Its choice was to dispose of the sleeping car business which is represented by the Pullman Company. Whether sold or retained by Pullman, Inc. the future conduct of the sleeping car business by the Pullman Company is, by terms of the judgment, subject to all the limitations imposed on it by the Court.

The sale now offered to us for approval is the final step in the proceeding to break the Pullman monopoly. It should not be thought of as the end product of the lawsuit. It is but a by-product. The main objects were accomplished in the elaborate judgment entered May 8, 1944, which followed the Court's opinion and findings of fact and conclusions of law. 55 F. Supp. 985.

We say all this because the argument has covered such a wide range that it might almost be thought that we had here a new proceeding in which the Court is being asked to determine the best way to conduct the sleeping car business for the benefit of the country at large. We do not think this very formidable undertaking is imposed upon us. We take it that the judgment of a court under the Sherman law is not to substitute the judicial judgment for that of the proprietors of the country's business enterprises. We think it is the court's task to strike at monopolistic practices when it finds them to exist and then leave it to competitive business, freed from mo-

nopoly, to take advantage of the freedom to profit itself and incidentally benefit the public.

So here, we think it is our responsibility to see that the disposal of its sleeping car business by the Pullman interests is done in a way which carries out the judgment of this Court. Pullman's choice of a customer has been the railroad group. Other prospective customers have described and extolled their offers both to the seller and to the Court. We think the variety of choice presented is a credit both to the ingenuity of those who thought up the various plans and to the lawyers who have presented them to the Court. Our conclusion is that the sale to the railroads should be approved.

In so concluding we want it to be perfectly clear that the restrictions imposed by the judgment upon the Pullman Company are still to be effective. Especially do we emphasize at this point the provisions of paragraph 26 of our judgment prohibiting exclusive dealing contracts. In the judgment, paragraph 10, we reserved the question of the extent to which persons acquiring the business or properties are to be bound by the provisions of the judgment. We now say that the terms are to apply to Pullman under the new ownership. That of course is clear from the terms of the judgment. They also are to be applied to any person or company to whom the railroads may later transfer the business, as contemplated by the provisions of their plan and a

provision of our order will so state. We pass then, to a discussion of the reasons which have led us to the conclusion stated.

The railroads are the natural and obvious people to do sleeping car business. They are the ones who own the rails on which the cars are drawn; it is their locomotives which pull sleeping cars as well as coaches and freight cars. It is the railroads' obligation to furnish the sleeping car service. This we think to be a point of highest importance in this connection. "Pullman service is like a public utility", we have been told. "Would you allow a public utility to be run by its chief customers?" The analogy is almost completely inaccurate. Sleeping car service, like dining car service, is part of the essential business of carriage of passengers in a country where distances between points are as they are in the United States. The carrier is obligated to furnish the service or see that it is provided. Were it not for the historical accident of the independent development of the sleeping car company as a concessionaire to furnish the service, one would expect to find it furnished by the railroad itself.

One railroad furnishing sleeping cars to the passengers on its lines is certainly not a situation which anyone could see as a possible source of Sherman Act violation. That was granted, we think, in all the arguments made to us. In this case, however, railroads doing something more than 95% of the passenger carrying business of

the country have joined together in the proposal to buy the stock of the Pullman Company. It does not follow that because one man can do a thing alone he can join with others in so doing. Does not this joining together of the railroads to own a sleeping car company simply substitute a railroad monopoly for the original Pullman monopoly? It has been asserted with great earnestness that it does by those other than the railroad group who seek to obtain the Pullman Company. That poses a relevant issue; the only one, we think, now before us. We think the answer is that it does not for the following reasons:

I. Part of the Pullman monopoly was its sale of cars manufactured by one of its companies (Pullman Standard) to the Pullman Company, which owned and operated the sleeping cars. No other car manufacturer could get into the market. On the occasions when he got an order for sleeping cars from the railroads who were interested in new developments, that purchase created difficulties with the road's sleeping car service because of the obstacles to such experiments put in its way by Pullman. This is described in the original opinion and need not be enlarged upon here. That phase of the monopoly is now gone. It is struck down by the provisions of the judgment and those provisions are reinforced by the order directing separation of the

manufacturer and servicing businesses from one ownership. The Government, in objecting to the proposed sale to the railroads, suggests that the habit pattern of railroads purchasing from Pullman Standard would be likely to be continued if the railroads owned Pullman.

This is a point of great force if established. It is not the kind of proposition that can be proved by mathematical demonstration either way. It can be replied that the habit pattern which was established only amounted to the purchase of sleeping cars by the Pullman Company from its manufacturing associate in the Pullman family, Pullman Standard, and it can be pointed out that even back in those days the railroads tried to break away by purchase of cars elsewhere and got into difficulty with Pullman when they did.

All the above is true. Yet it is also true that there have been interlocking directorates between Pullman, Inc. and the railroads. We talked about those in our original opinion. It is only in the last few weeks that some of these common directors have dropped out of Pullman, Inc. and we are not advised that all of them have done so even yet. We think there is very great danger to the public interest if the railroads by interlocking directorates, or whatever means there may be, continue the kind of tie-up which we found to exist and talked about in our original

opinion in this case. We are, therefore, going to impose three conditions in the order confirming this sale.

(1) The first is that there shall be no interlocking directorates between Pullman Standard, Pullman, Inc. and the railroads. The reason for this is obvious and requires no further explanation.

(2) We shall require the Pullman Company if and when it buys new sleeping cars to purchase them under competitive bidding. This is a change in position from what we indicated earlier in the course of this litigation. It is also a provision covering a situation which may never come into being for we do not think it likely that the Pullman Company, itself, will purchase new sleeping cars. But if this Company does or its successor does, the competitive bidding requirement will come into play.

(3) The third condition is that the railroads, in purchasing sleeping cars following consummation of the transaction under consideration, shall also purchase them from manufacturers following competitive bidding. The railroads are not defendants in this lawsuit and we know that perfectly well. But they are, for their own business purposes, coming in to deal with the business and property of a company that has got into serious trouble under the Sherman Act. We do not want the practices established under the monopolistic regime to carry over into the opera-

tion in the hands of the new owners. The requirement for competitive bidding will, we think, shut off the last possibility of any untoward influence of Pullman Standard following sleeping cars into the hands of the people who now take over.

II. We see no danger of the perpetuation of monopoly in a railroad owned sleeping car business. Here we must look rather closely at our concept of what constitutes an unlawful monopoly in this connection. The thing which got the Pullman Company into trouble was not that it was the only company furnishing sleeping car service, but that Pullman made it virtually impossible for anybody else to get into the business. This applied not only to a competing concessionaire, but even to a railroad which sought to run part of its own sleeping car service and let Pullman do the rest. We think we have got rid of all that by the careful limitations imposed upon Pullman Company by the original judgment in this case, and which will be imposed upon its successors by the order which we shall enter. A railroad may join with others and use exclusively the services of Pullman. It may do part of that service itself, or through some other concern of its own choosing, and ask Pullman to do the rest. It may own all of its own sleeping cars, or part of them, or none of them. All of this is provided for in our judgment. There is, then, no strangle hold on the sleeping car business by a railroad owned Pullman Company or anyone else. Therefore there is no

unlawful monopoly. If there is only one store in a town at which everyone trades, that fact does not itself constitute a monopoly in the legal sense. It is only when the merchant maintains his position by devices which compel everyone to trade with him exclusively that the situation becomes legally objectionable. So here. If the railroads who are the ones responsible for providing sleeping car service can take or leave Pullman assistance to that end, there is no objection to the fact that most of them may prefer to employ the Pullman concessionaire.

This whole problem would be a more simple one if the order could be that Pullman go out of the sleeping car business and sell to the individual railroads at fair terms such of its supply of sleepers as individual railroads needed. But that should not be done. The necessity of a reserve pool of cars to meet peak loads of all and seasonable requirements of some of the roads was discussed in the main opinion in this case. In the nature of things, this must be a common pool, with some sort of unified operation and control, if it is to be effective. All the parties have recognized the necessity of maintaining this pool, though various bidders have accused rivals of seeking to destroy it. The railroad plan proposes to maintain such a reserve, through a cooperative venture in which all may join. The proposal is that for the present all sleeping cars, whether bought by individual roads or not, shall be in the

general pool. This is imperative, since the armed forces need the service, and the emergency is not yet passed. Then it is proposed, after a period not to exceed three years, to set up or find a service concern which shall own the reserve pool of cars and furnish operating service to the roads which wish it. How do we know this will work? We cannot, for certainty, of course. Nor can we know for a certainty that the plans proposed by any bidders will work in a future which none of us can forsee. But we do know that the problem will be in the laps of those whose legal obligation it is to provide sleeping car service and who, by reason of that fact, must solve it. We also know that if any one of the partners in the cooperative enterprise starts to play fast and loose with one of its associates, this Court is open to a suitor who claims that our decree is not being complied with.

A great deal of argument has been presented to us during the hearing about the majority of the companies which own and operate the railroads of the country. They are said to be sleepy and unprogressive. The roads in turn, have offered testimony to the effect that they are industrial greyhounds, straining upon the start. We make no finding of fact on this point, nor confer either encomiums or epithets. We are concerned only with a small fraction of the total railroad business, that which has to do with sleeping cars. This part will probably rise little higher than the

general level of railroad competence. We do not think, in any event, it is within judicial responsibility or competence to make it do so.

We are also told that the railroads are dominated by a group of bankers and that the influence of the latter, if not sinister, is at least unprogressive and monopolistic in its tendency. When we reach this question we are beyond the scope of issues in this lawsuit which had Pullman, not the railroads, as defendants. The record tells us nothing of the operations of railroad bankers nor of the war between them, if such there is. Surely we should be going far beyond proper judicial process if we played, either way, any hunches we may have, about this question.

Approval of the sale to the railroads does not imply disapproval of other bidders. We are much impressed with all of them. We do not approve Pullman's selection because it has chosen the bid that brings it what it regards as the most favorable terms. We approve it because, following our direction to sell, it now appears with a buyer. That buyer is, as said above, the most natural purchaser, because it has the legal responsibility for providing sleeping cars and comes in under terms which we are satisfied are in accordance with the judgment of this Court.

Pullman with notice to counsel for the United States and the railroad buying group may submit a form of order for approval of its sale which embodies the provisions discussed in this opinion.

In the District Court of the United States for the Eastern District of Pennsylvania

Civil Action No. 994. June Term, 1940

UNITED STATES OF AMERICA, PLAINTIFF

v.

THE PULLMAN COMPANY, ET AL., DEFENDANTS

FINAL ORDER

(Entered January 4, 1946)

This cause came on to be heard upon the application of Pullman Inc. for approval of its executory contract of sale of stock to certain purchasing railroads, and, after testimony had been taken in court, was fully argued by counsel. Whereupon, upon consideration of the said application and of the petitions filed by several intervenors, it is upon motion of Ralph M. Shaw, Esq., Seth W. Richardson, Esq., and George Wharton Pepper, Esq., of counsel for the applicant, ordered adjudged and decreed as follows:

1. That the said contract of sale be and the same is hereby approved upon the conditions herein specified.

2. That the said conditions of approval are the following:

(1) That no person shall be at the same time a director of Pullman Inc. and of any vendee railroad, or of Pullman Standard and of any such railroad, or of Pullman Inc. and of Pullman Company, or of Pullman Company and of Pullman Standard;

(2) That in the event that Pullman Company desires to acquire new sleeping cars the purchase shall be made only after competitive bidding in the same manner as provided by the regulations ordered by the Interstate Commerce Commission on October 6, 1919, to be effective for competitive bidding, as those regulations have been or may hereafter be amended from time to time by the Interstate Commerce Commission;

(3) That in the event that any vendee railroad desires to acquire new sleeping cars the purchase shall be made only after like competitive bidding;

(4) That the term "vendee railroad" as used in the foregoing sub-paragraphs (1) and (3) of Paragraph 2, means a railroad which has purchased and at the time owns or controls any of the stock of the Pullman Company or at the time owns or controls the stock of any corporation to which any of the stock of the Pullman Company, or the assets or business of said Pullman Company or any substantial portion of the said assets or business, may be sold or transferred;

3. That after consummation of the sale hereby approved, Pullman Company and any person or corporation to whom the vendee railroads may hereafter sell Pullman Company's stock or assets shall continue to be bound until further order of the Court by all the provisions of the decree of this Court made May 8, 1944.

4. That the Pullman Company or any person or corporation to whom the vendee railroads may hereafter sell Pullman's stock or assets shall offer to enter into a contract to supply, as available, excess sleeping cars, not purchased by individual railroads, upon proper terms, to such railroads as may desire such contract.

5. That such detailed agreement as Pullman Inc. and the vendee railroads may formulate in order to consummate the sale hereby approved shall before execution be submitted to this court for approval together with evidence that no such interlocking directorates continue to exist as are herein disapproved.

6. That the terms of the order of this Court entered March 22, 1945, are hereby declared to have been complied with by Pullman Inc.

7. That the declarations of this order shall have the same effect as if injunction had issued to enforce them.

8. This order is made without prejudice to the rights of the employees of the Pullman Company under existing contracts and practices.

9. That jurisdiction of this cause is retained for the purpose of effectuating the provisions of this order.

By THE COURT
(s) JOHN BIGGS, JR.,
(s) ALBERT B. MARIS,
(s) HERBERT F. GOODRICH,
Circuit Judges.

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